87-1724

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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NO. _____

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JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, deceased,

Petitioner,

versus

INTERNATIONAL TELEPHONE AND TELEGRAPH CO; ITT REINSURANCE CO. OF LONDON; ITT LIFE INSURANCE; HARTFORD LIFE INSURANCE CO.; HARTFORD INSURANCE GROUP; and ALBERT J. STRATTON, On Behalf Of Himself And Certain Other Underwriters Of LLOYDS,

Respondents.

*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*

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## QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Petitioners have alleged in their Third, Fourth or Fifth Amended Complaints, a cause of action against the Respondents based on breach of contract, anti-trust conduct, or market place torts, or any one of such theories, sufficiently to withstand a dismissal for failure to state a claim under the guildelines established by this Court in *Conley v. Gibson*, 355 U.S. 41 (1947) and its progeny?

II.

Whether the district court was justified in imposing upon Petitioners the nine pleading requirements listed in its Order of February 7, 1986 and, to the extent the district court was so justified, whether the Petitioners complied with such requirements sufficiently to withstand the drastic remedy of dismissal for failure to comply with such Order?

III.

Whether most, if not all, of the pleading requirements contained in the February 7, 1985 Order - since they generally related to the question of whether the Petitioner Cates, a minority partner, had the standing to sue for his proportionate share of the potential partnership recovery against Respondents, despite the opposition to the suit of the majority partners, and since, further, a final judgment had been entered by the state court resolving that issue by partitioning to Petitioners their proportionate share of such recovery, with express right to proceed with this suit to effectuate such recovery - were made moot by the Final Judgment of Partition entered by the state court.

## LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioner in this Court and Plaintiffs in the action in the District Court are listed below along with Resondents in this Court and Defendants in action in the District Court:

Judy Cates, Individually and Independent Executrix of the Estate of James Cates, Deceased, Petitioner.

Benton Musslewhite,
Attorney for Petitioner.

International Telephone & Telegraph Co.; ITT Reinsurance Co. of London; ITT Life Insurance Company; Hartford Life Insurance Company; Hartford Insurance Group; Albert J. Stratton, on behalf of himself and certain other Underwriters of Lloyds, Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Petitioners and move the Court to grant a writ of certiorari in this cause and for such petition would respectfully show:

## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The district court's docket entry order of April 11, 1986, granting Respondents' motion to dismiss with prejudice is attached as Appendix A.

2. The district court's order of August 19, 1986, overruling Petitioner's motion for new trial is attached as Appendix B.

3. The unpublished order of the Court of Appeals, affirming the district court's dismissal, dated August 20, 1987, is attached as Appendix C.

4. The order of the Court of Appeals overruling Petitioner's motion for rehearing and motion for rehearing en banc, dated December 1, 1987, is attached as Appendix D.

## GROUNDS UPON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The order of the Court of Appeals overruling a timely filed petition for rehearing was entered on December 1, 1987.

This Petition for Certiorari was properly transmitted 90 days from the date of such order (90th day falling upon a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of Rule 12(b)(6), 9(b), 8(a), (e), (f) and 41(b) of the Federal Rules of Civil Procedure and the First and Seventh Amendments to the Constitution of the United States.

## STATEMENT OF THE CASE

Petitioner James Cates filed suit in 1979 against ITT Life Insurance Company and other ITT companies (hereinafter "ITT Life") and Lloyds of London (hereinafter "Lloyds"), alleging essentially three causes of action on behalf of two Texas general partnerships, San Jac International ("SJI") and San Jac Associates ("SJA"), namely: (1) that ITT

Life and Lloyds breached contracts with SJI and SJA; (2) that ITT Life and Lloyds conspired to restrain trade with respect to SJI and SJA, in violation of the anti-trust laws; and (3) that ITT Life and Lloyds committed market place torts against SJA and SJI, for example tortious interference with contracts, fraud, and the like. Cates also sued ITT Life and Lloyds individually, for anti-trust violations and market-place torts aimed at him individually.

The lawsuit revolves around a "multiple employers trust" that was conceived and designed by James Cates. As alleged, "these trusts were designed to market the insurance products (such as medical, hospitalization, health, accident, disability and life insurance), to handle claims, and, through the advantageous combination of employer groups, generate substantial savings to the policyholders and members of the various trusts...." (p.

4, App. G). This trust was to be administered (including marketing of the insurance products, processing of claims and all administrative functions) by the two "San Jac" entities, SJA and SJI[1] ITT Life, pursuant to contractual agreements between SJA and SJI and ITT Life, agreed to be the insurance underwriter for the trust. In turn, ITT Life and SJA and SJI entered into agreements with Lloyds for reinsurance.

The breach of contract allegations centered upon three assertions:

(1) that the agreements between ITT Life and SJA, SJC and SJI required ITT Life to market San Jac products in eleven states; however, the depositions of officers of ITT Life established that ITT Life brazenly ignored its obligations in that regard and ***did not even try*** to market

1. San Jac Corporation ("SJC") was also initially sued, but it played such a minor role in the scheme of things that plaintiffs subsequently dropped SJC as a party.

the San Jac products in those eleven states. See pp. 6-8, 24-26 of App. G.

(2) that the agreements and custom and practice obligated ITT Life, as the insurance underwriter, to pay all claims processed and approved by SJA and SJI in a timely manner: however, ITT Life repeatedly and unreasonably delayed the payment of claims, in breach of its obligations in that regard. See pp. 9-10, 24-26 of App. G.

(3) that ITT Life had the contractual obligation to perform all the responsibilities of insurance underwriter but, instead, forced upon the San Jac entities "conduct inconsistent with the Insurance Code of the State of Texas by requiring that they undertake local insurance company functions"; ITT Life thereby breached the contractual agreements whereby it was to perform the underwriter functions. See pp. 10, 11, 24-26 of App. G.

(4) that the foregoing breaches resulted in tremendous damages to the San Jac entities because each of them, or a combination thereof, caused a drastic reduction in gross income to the San Jac entities, a hemorraghing of members and member groups and unanticipated costs and expenses; the consequences of these adverse effects was to economically destroy and drive the San Jac entities out of business. See 33-35, App. G.

The anti-trust allegations essentially centered upon the contentions that the conduct of the Respondents, ITT Life and Lloyds, violated the Clayton Act, 15 U.S.C. 15 and 24 and the Sherman Act, 15 U.S.C. 1 and 2, in that such Respondents conspired to squeeze-out, economically destroy and take over the San Jac entities and then to generate a boycott of Cates in the insurance industry, all in restraint of trade. See pp. 16-24, App. G.

The market-place torts allegations involved averments that the defendants, individually and in concert, tortiously interferred with contracts between the San Jac entities and their agents and brokers; tortiously interferred with the use and enjoyment of the San Jac entities' property rights, namely the employers trust concepts and lists of brokers, agents, and marketing sources; committed tortious civil obstruction of justice by acting in collusion with the majority partners to wrongfully interfere with San Jac's lawsuit against the defendants; and were guilty of tortious "outrageous conduct", tortious fraud and tortious breach of fiduciary obligations. See pp. 26-33, App. G.

Petitioners also alleged that the Respondents, after the partnerships became defunct, launched upon a course of tortious conduct toward Cates individually (tortious interference with his contracts and legal rights, boycott and other outrageous conduct).See pp. 61-68, App. G.

Petitioners took a number of depositions of ITT Life officers and employees, some of whom admitted to a breach of the contracts with SJA and SJI. See depositions on file in district court. Soon thereafter, ITT Life activated its conspiracy with Cates' majority partners, G. C. Petty ("Petty"), Robert Boyer ("Boyer") and Michael Collins ("Collins") and had them intervene to stop all proceedings on behalf of SJA and SJI. Petitioners filed a Second Amended Complaint alleging a partnership derivative suit; that Petty, Boyer and Collins were actig in collusion and conspiracy with ITT Life and Lloyds in order to forestall the suit on behalf of SJA and SJI; and that Petty, Boyer and Collins, acting contrary to the best interests of SJA and SJI, conspired with ITT Life and Lloyds for their own personal benefit. Petitioner asked for the appointment of a receiver for SJA and SJI, a winding up of their affairs, a partition of the assets, including the lawsuit

against ITT Life and Lloyds, and that Petitioner be allowed to proceed against ITT Life and Lloyds for his proportionate share of the partnership lawsuits.[2]

Despite these allegations, ITT Life and Lloyds persuaded the district court, Bue, J., to dismiss the complaints on the grounds that Petitioner had stated no cause of action, either individually or on behalf of the partnerships, or for his proportionate share of the partnerships' suit against ITT Life and Lloyds. The Fifth Circuit Court of Appeals reversed and, in a thorough opinion by Judge Garwood, held that Petitioner, as a minority partner, indeed did have the right to pursue the partnership claims on behalf of his proportionate share as long as he alleged "improper ulterior motives"

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2. Cates owned one third of SJI and one half of SJA. Cates died while the first appeal was pending. His wife, Judy Cates, was substituted by suggestion of death for the estate of James Cates as well as for herself as surviving wife. We will continue to refer to the Cates' representative plaintiffs as "Cates" or "Petitioners".

or bad faith on the part of the majority partners with respect to the lawsuit on behalf of the partnerships and that if a minority partner makes such allegations he can pursue such lawsuit for his "percentage of such claims." **Cates v. ITT Corp.**, 756 F.2d 1161 (5 Cir. 1985), see discussion particularly at 1178-80.[3]

Soon after issuance of the mandate, Petitioner filed a motion for leave to file Plaintiffs' Third Amended Complaint and Judge Bue denied that motion and issued an Order dated February 7, 1987, listing nine modifications he wanted Petitioner to make in his pleadings in

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3. The Court of Appeals mentioned a number of ways in which this could be accomplished, including but not limited to, minority partner's derivative suit, appointment of a receiver, partition or directly by allegations setting up improper ulterior motives or bad faith. The Court of Appeals did not make it clear whether the "receiver" could be appointed by the federal court as well as the state court. Cates had already instituted, in state court, an action against Petty, Boyer and Collins asking that a receiver be appointed for SJA and SJI and that the assets, including the lawsuit against ITT Life and Lloyds, be partitioned.

order to be permitted to amend. This Order did *not* indicate that Judge Bue did not understand the pleadings, or that they were confusing or voluminous, or that they were *not* "short and plain." This Order required the plaintiffs to plead in *more detail*, not less, and with *more particularity* the allegations as to fraud, conspiracy, bad faith, special damages and jurisdiction.[4] The February 7, 1986 order is attached as Appendix E to this Petition. Petitioners then filed their motions for leave to file the Fourth and Fifth Amended Complaints and we have attached a chart, as Appendix F, which lists the paragraphs in both the Fourth and Fifth Amended Complaints demonstrating that Petitioners completely satisfied *all* of the pleading requirements imposed by

4. The Order also required the Petitioners to delete all new causes of action and parties, all allegations that Cates had actual authority to initiate the suit and all references to Cates as a contracting party and, finally, required that Cates' individual claims be alleged separately from his allegations on behalf of the partnerships. See Appendix E.

Judge Bue in the February 7, 1986 order. We have also attached the Fifth Amended Complaint as Appendix G.

Meanwhile, the state district court entered an agreed Final Judgment partitioning the assets of SJA and SJI, including the lawsuit and claims against ITT Life and Lloyds, with Cates being expressly given the right to proceed against ITT Life and Lloyds for his proportionate share of the partnerships' claims against them.[5] The effect of this

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5. The concept of winding-up and partitioning the assets, including the partnership claims, was suggested by the Court of Appeals in the first appeal. 756 F.2d at 1180. Indeed, since the Final Judgment of partition was "agreed to" between Cates and the majority partners, it cannot be denied that the majority partners thereby "consented" to the suit against ITT Life and Lloyds, thus surely making all pleadings and arguments about Cates' right to sue for his proportionate share of SJA's and SJI's claims against ITT Life and Lloyds moot. The Respondents tried to obviate the Final Judgment of partition on the ground that it was entered after the dismissal. However, since it was entered, and brought to the attention of the district court, long before the court passed upon the Petitioners' motion for new trial, the district court had the duty to consider it and give it full force and effect. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5 Cir. 1981).

partition judgment was to make the allegations, and the complaints about such allegations by Judge Bue (in his February 7, 1986, order) concerning ulterior motives, conspiracy, bad faith and other allegations relating to Cates' standing-to-sue for his proportionate share of the partnership claims, ***entirely moot***. See Final Judgment of Partition, attached as Appendix H.

Moreover, aside from the mootness of the standing-to-sue allegations, Petitioners will demonstrate, see argument *infra*, that the pleadings of conspiracy, bad faith and ulterior motives, contained in the Fourth and Fifth Complaints, were more than sufficient to satisfy the federal rules. In that regard, Petitioners alleged that the majority partners, toward the end of the active history of the partnership entities, started conspiring and colluding with the Respondents; they began giving them Cates' trade secrets, including his methodology, list of customers, etc.; such

actions were damaging to the partnership entities; when Cates decided that it would be in the best interests of the partnerhip entities to sue the Respondents, the majority partners conspired with the Respondents to obstruct civil justice and to forestall the suit by opposing it, not for legitimate business reasons but for the ulterior, selfish motives hereinafter described; indeed, the majority partners had admitted publicly that the lawsuit should be filed, that it was a viable lawsuit and that it was the last hope for the survival of the partnerships; the majority partners - though publicly admitting that the partnerships were insolvent and worth nothing except for the lawsuit itself and that they did not intend to spend any more time or money on the partnership business, leaving Cates to do the winding-up - refused, for no valid business reasons,Cates' offers to buy them out and/or indemnify them if they would let him pursue the lawsuit (all at his own

expense); they also unreasonbly opposed the state court suit to have a receiver appointed who would be authorized to pursue the federal court lawsuit, complete the winding-up and partition the assets of the then defunct partnership entities; most indicative of the conspiracy was the secret settlement the majority partners entered into with the Respondent ITT life, the purpose of which was to utterly destroy Cates' standing to continue the litigation against ITT Life; the majority partners also thereafter secretly moved the records of the partnership entities (which Cates needed for use in the federal lawsuit) to Odessa, Texas, beyond Cates' control and beyond the jurisdiction of the court; and the "ulterior motives" of the majority partners in conspiring with the Respondents to obstruct the partnership lawsuit were to receive from the Respondents "personal" dispensation in connection with claims against the

majority partners, beneficial compensation and help in starting up their new businesses in the insurance industry. See Count Four, pp. 36-60 of App.G. These allegations, stated in great detail as required by Judge Bue, tracked the suggestions of the Fifth Circuit in its first decision, 756 F.2d at pp. 1175-1181. The Petitioners requested the appointment of a receiver; a partition of the assets, including the lawsuit; a winding-up of the affairs of the partnerships; asserted a minority partner derivative suit; and sought equitable recovery of Cates' proportionate share of the partnership damages, all as suggested by the Fifth Circuit. 756 F.2d at 1175-1180 and Count Four, App. G, pp. 36-60.

The district court - despite the Final Judgment of Partition; despite the fact that Petitioner had complied with the February 7, 1986 Pleading Order in all respects; and despite the fact that the

Second, Third, Fourth and Fifth Amended Complaints stated viable causes of action against ITT Life and Lloyds - denied Petitioners motion for leave to amend and dismissed Petitioners' case on the asserted ground that the Fourth and Fifth Amended Complaints were "regurgitations" of the Third Amended Complaint and, impliedly, that none of them stated a cause of action. The district court's docket entry of April 11, 1986, granting Respondents' motion to dismiss with prejudice, and the district court's order overruling Plaintiffs Motion for New Trial are attached as Appendices A and B.[6]

The Petitioners timely appealed to the Court of Appeals and - after eight years of litigation in which

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6. It should be noted that, although the Respondents spent a great majority of their time and effort seeking to have the district court impose sanctions, including the sanction of dismissal, upon Petitioners, as we stand before this Court the question of sanctions for any reason is irrelevant because the district court expressly declined to impose any sanctions and based the dismissal *solely* on the ground of pleading deficiencies.

hundreds of hours of legal time and thousands of dollars in litigation costs had been expended; after substantial discovery on the merits had been completed; after that discovery established that Petitioners would almost certainly make recovery against ITT Life, at least for breach of contract; after the thorny standing-to-sue question had been resolved, despite the district court's erroneous handling of the issue, by the Court of Appeals in the first appeal and also by the state court's Final Judgment of Partition of the partnership assets; without the Respondents having filed a motion for summary judgment so that Petitioners would at least have the protections of Rule 56, FRCP.; and after Petitioners had filed five complaints, two of which clearly complied with the district court's order to plead in more, not less, detail - the Court of Appeals

summarily, without fanfare, without an opinion, and totally without justification, stripped Mrs. Cates and the estate of James Cates of their right to a trial before a jury, in violation of the First and Seventh Amendments and directly contrary to this Court's decision *Conley v. Gibson*, 355 U.S. 41 (1957) and even contrary to its own prior decision, 756 F.2d 1161. See the unpublished Court of Appeals' decision in this appeal, Appendix C, and the denial of petition for rehearing and rehearing en banc, Appendix D.

## REASONS FOR GRANTING CERTIORARI

**A. Preliminary Statement.** This is a case deserving certiorari intervention by this Court because it is a gross - and we respectfully repeat, *gross* - travesty upon justice. The fundamental question here is whether this Court wants to allow legal rights to be unjustly emasculated through hypertechnicality. Any reasonable person can discern from the Fourth and

Fifth Amended Complaints what the essential bases of Petitioners' allegations against the Respondents are. The Petitioners have in every way complied with Rule 8 of the F.R.C.P. The tragedy is that the district court would never force the Respondents to complete discovery on the merits (which had been well underway) and then proceed to trial on the merits. If the district court had, this case would have probably been settled or certainly disposed of with a lot less judicial time and parties' expense. And most important, the ends of justice would have been served, as Rule 8 requires. Finally, what is so judicially tragic in this case is that Respondents did not secure a summary dismissal after Petitioners had been afforded the protections of Rule 56. Instead - after seven years of hard-fought litigation; in a case involving millions of dollars in real losses; wherein hundreds of pages of

depositions had been taken; the Court of Appeals had previously taken the pains to write a long and important opinion reversing the district court in another instance where Respondents had led the district court into an erroneous dismissal - Respondents secured a disposition by the Court of Appeals via a one paragraph statement, sweeping away Mrs. Cates' rights forever.

**B. Grant of Certiorari Is Appropriate Because of the Direct Conflict Between the Second Decision of the Court of Appeals, Made the Basis of this Petition, On the One Hand, and *Conley v. Gibson* and the First Decision of the Court of Appeals, On the Other Hand.**

In this appeal, the Court of Appeals, in the decision made the basis of this Petition, in effect held that neither the Second, Third, Fourth nor the Fifth Amended Complaints stated a cause of action against ITT Life and Lloyds. While

the Court of Appeals in the first appeal did suggest that the Second Amended Complaint could have been drawn better, it did consider it adequate enough to require a reversal. The Court stated:

> We are, of course, governed by the rule that pleadings are to be construed with great liberality when there has been a dismissal on the merits for failure to state a claim. Such a dismissal is not proper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). And, in this connection, a deficiency in "recitation of formulas" will not normally justify the dismissal. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5 Cir. 1981).

756 F.2d at 1179-1180.

Professor Wright, in Wright and Miller, *Federal Practice and Procedure*, Chap. 4, Sec. 1202, pp. 59-61, has elucidated further the law concerning pleadings:

> Rule 8 is the keystone of the system of pleading embodied in the federal rules. These provisions state that technical forms of pleadings are not required, that pleadings are to be construed liberally so as to do substantial justice . ... as a practical matter these provisions have ramifications that transcend the pleading stage of federal practice. To some degree, the functioning of all the procedures in the federal rules for broad joinder of

> parties and claims, discovery, free amendment, and summary judgment are inextricably intertwined with the pleading philosophy embodied in Rule 8. ... *The relevant facts may be determined by discovery.* The issues likewise may be narrowed by discovery, or by a pre-trial conference, or by "partial summary judgment" under Rule 56(d). ... *The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules may simply be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon ... No more is demanded of the pleadings than this."*

(Emphasis ours). As Professor Wright further noted, "under the Federal Rules it is very difficult for counsel to draft a pleading so badly as to lose the rights of his clients ... indeed, it has been said that 'a sixteen-year old boy could plead' under these rules." *Id.* at 65.

It defies reason for anyone to say that he or she cannot easily perceive, from a reading of the Third, Fourth or the Fifth Complaints, that ITT Life and Lloyds are being sued for breach of contracts with SJA and SJI, for anti-trust and market place tortious conduct towards SJA and SJI

and for tortious misconduct toward Cates individually. Neither the Court of Appeals, nor the district court below, nor even the Respondents, *ever* complained about the breach of contract allegations or the allegations of general damages. The essence of the criticism of the Court of Appeals in the first appeal concerned the allegations of fraud, 756 F.2d at 1180, and the court below extended that criticism to the "bad faith" and "conspiracy" allegations, *solely* as they pertained to the standing-to-sue question. See App. E.[7] But, in the first place, the

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7. The allegations as to jurisdiction track the Pleadings' Form Appendices to the federal rules and the allegations as to special damages are more than adequate. See 5 Wright, *Pleading Special Damages*, Sec. 1310, p. 442, et seq. and *Great American Indemnity Co. v. Brown*, 307 F.2d 306 (5 Cir. 1962). The other requirements in the February 7 Order - such as dropping the new parties and claims, not referring to Cates as a contracting party and separating the invidiaul claims from the partnership claims - were obviously complied with. See App. F.

Final Judgment of Partition made those pleadings, and the entire issue of whether Cates could recover his proportionate share of the partnership claims, moot. See discussion by the Court of Appeals in the first appeal to the effect that a minority partner can recover his "aliquot" share or "appropriate fraction" of partnership claims. 756 F.2d at 1179.

In the second place, *there is absolutely no reason why - since not even the district court criticized such allegations - the Court of Appeals in this appeal did not at least reverse the total dismissal and hold that plaintiffs had stated a cause of action for their proportionate share of the claims of SJA and SJI for breach of contract, anti-trust violations and market-lace torts (other than fraud) against ITT Life and Lloyds. Cates v. ITT* (first appeal), this Court in *Conley v. Gibson* and *Dussouy* absolutely require at least that much. And the most

shocking of all is that the Court of Appeals in this appeal - in complete defiance of the Court of Appeals' decison in the first appeal - even affirmed the striking down of Cates' individual causes of action against ITT Life and Lloyds. This is particularly distressing since Cates clearly separated the individual causes of action from the partnerhip causes of action which is the *only* thing the district court below required the Petitioners to do in order to satisfy the Pleading Order of February 7, 1986, with respect to the individual causes of action.

Most important, the actions of the Court of Appeals in this appeal directly conflict with the venerable precepts long established by this Court in such cases as *Conley v. Gibson*, 335 U.S. at 45-46 [a dismissal of pleadings is not proper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief"]; *Foman v. Davis*, 371 U.S. , 182 (19 )[reaffirming the policy of federal rules to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading]; and *McLain v. Real Estate Investment Board*, 444 U.S. 232 (1980).

As we have stated above, a reading of the Third, Fourth or Fifth Complaints demonstrates beyond doubt that Petitioners plainly stated a cause of action *on at least one of the counts asserted*, thus precluding a dismissal with prejudice *of the entire suit*. And, indeed, at the very least, it *cannot* be said that "beyond doubt plaintiffs could prove no set of facts in support" of one or more of their claims. Therefore, because the Second Court of Appeals' affirmation of the district court's improvident dismissal clearly conflicts with *Conley v. Gibson*

and the other Supreme Court authorities cited above, and even Fifth Circuit law, see the first Fifth Circuit appeal, 756 F.2d 1161 and *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5 Cir. 1981), the Court should grant certiorari in order to resolve the conflict and therefore maintain a uniformity in the law.

**C. The Question Concerning the Pleadings Is Extremely Important Because It Goes To The Threshhold Fundamental Due Process Right To Have Cases Heard On The Merits Rather Than Being Dismissed On Hypertechnical Grounds.**

As this Court recognized in *Conley v. Gibson* and *Foman v. Davis*, questions such as those presented here are important because they deal with the fundamental purposes of the federal rules and our Constitution (see the First and Seventh Amendments) and that is to give every citizen the right to his or her day in court without having it unjustly stripped away on hypertechnical grounds. To hold,

as the Second Court of Appeals did in this case, that Petitioners did not allege a cause of action in the Third, Fourth or Fifth Amended Complaints is to violate those important precepts.

**D. Petitioners Fully Complied With Pleading Order of February 7, 1986; Therefore No Part of the Plaintiffs Fourth or Fifth Amended Complaints Should Have Been Stricken.**

The chart we have attached as Appendix F conclusively establishes that Petitioners totally complied with the Pleading Order of February 7, 1986. As we noted above, Judge Bue did not ever say *he* did not understand the plaintiffs' complaints. Nor did *he* criticize such pleadings for being too long or too verbose. Indeed, he criticized the Third Amended Complaint *primarily because it was not detailed enough*. See App. E. Therefore, Petitioners - standing before a judge whose dismissal of their case had already been reversed once, and who was making noises

as if he were setting the stage for still another dismissal, See App. E - can hardly be blamed for pleading again, and again, and again, the details of the fraud, the conspiracy, the bad faith and the collusion theories. As was counsel's duty, we were doing everything in our power to satisfy the district court's seemingly insatiable desire for particularization and detail. We do not believe it was fair to Petitioners for the Second Court of Appeals, as it may have done, to penalize Petitioners and deprive them of their constitutional right to trial by jury, because Petitioners were guilty of doing precisely what the district court ordered them to do - plead in great detail.[8]

---

8. We mention this because, at oral arguments in the Court of Appeals, members of the Panel made comments about verboseness and repetition and, because the Court of Appeals did not deign to express any reasons for its decision, Petitioners have no way of knowing whether this was actually one of the reasons for its decision or not.

And, in any event, the allegations contained in the Fourth or Fifth Amended Complaints were more than adequate to sustain the charges of "conspiracy" and "bad faith" on the part of the majority partners.[9] The first Court of Appeals in *Cates v. ITT* pointed to similar allegations as being sufficient, see e.g., 756 F.2d at 1165, 1166. In *Storrie v*

---

9. We should point out Rule 9(e) is directed toward allegations of "fraud" between parties, the details of which the complaining party should have about as much knowledge as the party complained of. But that is *not* the type of turpitude - insofar as the conduct of the majority partners and the defendants relating to Cates' efforts to sue the defendants was concerned - that the Court of Appeals in the first appeal, *ITT Life v. Cates*, deemed necessary to provide Cates with the standing-to-sue on behalf of the partnerships. The Court was speaking of a "conspiracy" similar to that referred to in *Poller v. CBS*, 368 U.S. 464 (1962), between defendants and third-parties, wherein the Court stated that it is a rare case when a plaintiff is not entitled to a jury trial, "the hallmark" of our system of justice, on the issue of "conspiracy", in which cases most of the evidence "is in the heads of the conspirators and hostile witnesses thicken the plot." 368 U.S. at 491.

*Fort Worth Stockyards*, 143 S.W. 286 (Tex.App.-Ft Worth 1911, no writ), the allegations were much more sparse, the plaintiffs alleging simply that the majority partners had settled a valid partnership claim for less than its value. 143 S.W. at 287. In *Dussouy* it was simply alleged that the defendant Gulf Coast and their lawyers conspired together to restrain trade. 660 F.2d at 597, 598. In *Quality Foods v. Latin Agribusiness Dev.*, 711 F.2d 989 (11 Cir. 1983), a simple conspiracy between the primary defendant and its separate subsidiary to make loans as a means of taking over competition was alleged. 711 F.2d at 993. In *Brunswick Corp. v. Vineberg*, 370 F.2d 605 (5 Cir.1967), the plaintiffs merely alleged a conspiracy by defendants "to strip the Bowl (bowling lanes) of its assets and thus of its ability to perform its contract with Brunswick". *Id.* at 607.

In *Klebanow v. New York Produce Exchange*, 344 F.2d 294 (2 Cir. 1965), the allegations were nothing other than that the majority partners had ties with one of the defendants who were the object of a partnership claim. 344 F.2d at 296. The allegations in *Riveria Congress Assoc.*, 18 N.Y. Supp.2d 386 (Ct.App., N.Y. 1966), were asserted in much less detail but are basically the same as those in this case - that the majority partners conspired with a third party to give them an assignment of a lease which was disadvantageous to the partnership and then refused to sue the third party. 18 N.Y.Supp.2d 389, 390. In *Sax v Sax*, 294 F.2d 133 (5 Cir. 1961), the plaintiff, the wife of a beneficiary of a trust, alleged a conspiracy between the beneficiary and the trustee to deprive the wife of a fair separate maintenance allowance from her husband. 294 F.2d at 134. *In all the foregoing cases the courts held the allegations were sufficient to support a cause of action*

*based upon conspiracy.*[10]

F. In Sum, It Is Important For This Court To Grant Certiorari And Make It Clear That *Conley v. Gibson* Is Still The Law; That The Right Of Parties To Petition The Courts and To Trial By Jury, Imbedded In The First And Seventh Amendments, Is Still Sacred; And That This Court Simply Will Not Tolerate The Use By Federal Courts Of The Drastic Remedy of Dismissal Of Complaints For Failure To State A Claim Or To Comply With Pleading Orders Unless It Is Clear *Both* That The Pleading Cannot

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10. Other cases, including Texas cases, are just as liberal concerning conspiracy allegations. *O'Quinn v. Chambers County, Texas*, 636 F.Supp. 388 (S.D.Tex. 1986), on reh. 650 F.Supp. 25 (holding allegations of conspiracy to obstruct justice sufficient); *Grossling v. Ford Memorial Hosp.*, 614 F.Supp. 105 (D.C.Tex.); *Kirby v. Cruce*, 688 S.W.2d 161 (Tex.App. 1985) (holding that civil conspiracy need not be shown by direct evidence and is ordinarily established by circumstantial evidence "since such conspiracies are conceived in secrecy and executed in a manner to avoid detection and exposure"); and *Mack v. Newton*, 737 F.2d 134 (5 Cir. 1984) reh den 750 F.2d 69. Also see *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Massey-Ferguson, Inc. v. Bent Equip. Co.*, 283 F.2d 12 (5 Cir. 1960).

**Possibly Be Read To State Any Cause Of Action And Such Pleading Order Was Clearly And Wilfully Violated.**

The foregoing title says it all. If the Second Court of Appeals affirmed the dismissal because it believed the Third, Fourth and Fifth Amended Complaints failed to state any cause of action, it is, as we have stated above, in direct conflict with *Conley v. Gibson*. If the Court of Appeals affirmed the dismissal as a "sanction" for failure to comply with the pleading order of February 7, 1986 (a ground which the district court negated in its Order Overruling Motion for New Trial, App. B), then, since it is quite clear that Petitionrrs made a bona fide effort to comply with such order, the Second Court of Appeals decision is in direct conflict with *Insurance Co. of Ireland v. Compagnie des Bauxites de Guinee*, 450 U.S. 694 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 346, 354

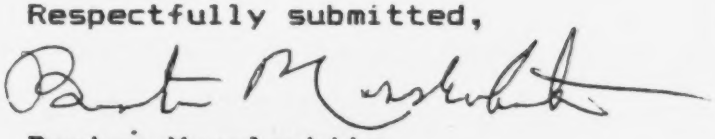
(1969).[11] And these are the only two possible grounds upon which the Court of Appeals could conceivably have affirmed the district court's improper dismissal.

---

11. The district court's comment about "lack of candor" is really unfair. See App. B. The only thing this could be referring to is the fact that Petitionners, in response to Respondents' motions to dismiss had mistakenly stated that the state court had appointed a receiver, when in fact the court had only ordered that "a receiver (be) appointed." See App. I. As explained in an affidavit attached to Petitioners' responding papers, this mistake occurred because the young attorney who handled the hearing before Judge Gupton thought that the appointment of the Receiver would automatically follow. In any event, the issue of a Receiver had absolutely no bearing upon the proceedings in the court below, because, after the Judge Gupton's order was entered, Judge Powell entered the Final Judgment of partition, See App. H, thus making, insofar as Petitioners' standing-to-sue for their proportionate share of the partnership claims were concerned, the apppointment of a Receiver totally moot. Moreover, the district court made it clear that it was not in any way basing its decision to dismiss upon the statements concerning the Receiver. See App. B.

WHEREFORE, premises considered, Petitioners pray the Court to grant certiorari in this case.

Respectfully submitted,



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TBA #

87-1724

Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

*

NO. _____

*

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, deceased,

Petitioner,

versus

INTERNATIONAL TELEPHONE AND TELEGRAPH CO; ITT REINSURANCE CO. OF LONDON; ITT LIFE INSURANCE; HARTFORD LIFE INSURANCE CO.; HARTFORD INSURANCE GROUP AND ALBERT J. STRATTON, On Behalf Of Himself And Certain Other Underwriters Of LLOYDS,

Respondents.

*

# APPENDICES

*

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
Attorney for Petitioner

## LIST OF APPENDICES

A. District Court docket entry of dismissal, dated April 11, 1986.

B. District Court's order of August 19, 1986, overruling motion for new trial.

C. Judgment of Court of Appeals, dated August 20, 1987, affirming district court's dismissal.

D. Order of Court of Appeals dated December 1, 1987, denying petition for rehearing and rehearing en banc

E. Order of district court dated February 7, 1987 imposing nine pleading requirements upon Plaintiffs

F. Chart outlining compliance with February 6, 1986 order

G. Fifth Amended Complaint

H. The Final Judgment of Partition of the State Court, dated June 25, 1986

I. Order of State Court that a Receiver would be appointed

APPENDIX A

CASE NO. H-79-1998
CATES

v.

I.T.T., et al.

COUNSEL
APPEARING:
Musslewhite
Reich
Lowes
Cornell

DATE OF
CONFERENCE: 4/11/86 at 9:30 AM

LAW CLERK: M

MOTIONS PENDING

O R D E R following conference

1. Pltf Motion to File 4th Amended Complaint #195 Denied.

2. Deft. Motion to Dismiss With Prejudice #196 granted.

4/11/86
DATE

/s/
CARL O. BUE
UNITED STATES DISTRICT JUDGE

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| JUDY CATES, Individually and as Independent Executrix of the Estates of James Cates, Deceased, | ] | |
| Plaintiffs, | ] | Civil Action |
| vs. | ] | No. H-79-1998 |
| International Telephone and Telegraph Corporation, et al., | ] | |
| Defendants. | ] | |

ORDER

Before the court are Plaintiff's Motion for New Trial and Reconsideration of Order Granting Joint Motion to Dismiss, and Defendants' Opposition to Motion for New Trial and Motion to Impose Sanctions. After careful consideration of the record, the breifs submitted by the parties, and the arguments of counsel, the Court is of

the opinion that Plaintiff's motions should be denied.

Procedural History

This case was originally filed agianst ITT Life Insurance Company and certain underwriters at Lloyds of London, Ltd. in September 1979 by Mr. Cates ("Cates") on behalf of himself and two Texas partnerships of which he was a member, San Jacinto International and San Jacinto Association. In February, 1983 this Court granted Cates leave to file a Second Amended Complaint and also granted Defendants' Motion for Summary Judgment.

On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded the case to this Court to address the effect of Cates'

> allegation [that his partners wrongfully conspired with the Defandants and acted out of collusion with them, from improper or ulterior motives and not in an effort to further the best interest of the partnerships] on his right to maintain suit on the partnership causes of action, either derivatively in the name of the partnerships, or for his percentage of such claims or alternatively to have

action on the case deferred until a receivership application could be acted on in his state court suit or the partnerships winding up could be completed.

Cates v. International Tel. and Tel. Corp.,756 F.2d 1161, 1180 (5th Cir. 1985). The Fifth Circuit noted that Cates' pleadings and motions were extremely conclusory, confused, and unclear.

Upon remand of the case to this Court, the Plaintiff's counsel filed a Motion for Leave to File Third Amended complaint. This Court found the Third Amended Complaint defective as a matter of form, and entered an order in February, 1986 directing Plaintiff's counsel to amend the Proposed Third Amended Complaint on five specific grounds. The Court further directed that Plaintiff not add any new defendants or new causes of action.

In May, 1986 this Court entered an order granting a Joint Motion to Dismiss ITT Life Insurance Company and other named Defendants. Plaintiff filed a Motion for

New Trial and Reconsideration of the Joint Motion to Dismiss, asserting that this Court erred in refusing to grant leave to file the Third or Fourth Amended Complaint; in refusing to proceed to trial on the Second Amended Complaint; in refusing to advise Plaintiff of the portions of the Third Amended Complaint deemed improper; in failing to conduct an evidentiary hearing concerning the issue of standing; in failing to appoint a receiver; and in failing to continue this suit pending the intervention of a purported receiver allegedly appointed by the 151st Judicial District Court of Harris County, Texas.

The Fifth Circuit admonished that its remand did "not imply that the District Court need countenance improper pleading." Cates at 1181. This Court reviewed Plaintiffs's Third Amended Complaint and ruled that the Third Amended Complaint was defective as a matter of form. Plaintiffs' Fourth and Fifth Amended Complaints are

merely regurgitations of the prior, deficient complaints. Therefore, this Court properly refused to grant leave to file the Third, Fourth and Fifth Amended Complaints.

Plaintiff alleges that this Court erred in failing to designate which portions of the Third amended complaint were deemed improper. However, in the Order dated Fedruary 7, 1986 this Court specifically stated which portions of the Third Amended Complaint were deficient. Instead of curing the defects, Plaintiff merely filed a Fourth Amended Complaint which was as defective as the Third Amended Complaint.

Plaintiff contends that this Court erred in failing to conduct an evidentiary hearing on [the issue of] Petitioner's lack of standing to sue. The Fifth Circuit disposed of the standing issue and remanded the cause of action to determine whether "sufficiently exceptional circumstances exist so that Ms. Cates should be allowed to prosecute the

partnership causes of action." Cates, at 1175. Plaintiff has failed to comply with the mandate of the Fifth Circuit by failing to amend his pleadings to state a partnership derivative cause of action. Moreover, the Plaintiff has wholly failed to comply with this Court's directive of February, 1986 to amend his pleadings in compliance with the mandate of the Fifth Circuit.

Lastly, Plaintiff contends that this Court erred in dismissing this suit pending the intervention of a receiver appointed by the 151st Judicial District Court of Harris County, Texas. However, the facts show that no receiver has been appointed in the companion state court case. Plaintiff also claims that this Court erred by failing to appoint a receiver. However, the Fifth Circuit did not require that this Court appoint a receiver.

The Court finds that the continued lack of candor exhibited by the Plaintiff's

counsel coupled with his refusal to follow the directives of this Court may result in the imposition of sanctions pursuant to Rule 11, FED. R. CIV. P.

Accordingly, Plaintiff's Motion For New Trial and Reconsideration of Joint Motion to Dismiss is DENIED. Defendants' Motion to Impose Santions is likewise DENIED.

SIGNED AND ENTERED at Houstion, Texas, on this the 19th day of August, 1986.

/s/ Carl O. Bue
United States District Judge

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

*

No. 86-2749

*

JUDY CATES, INDIVIDUALLY AND
AS INDEPENDENT EXECUTRIX OF
THE ESTATE OF JAMES CATES,
Deceased,

Plaintiff-Appellant,
Cross-Appellee,

versus

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION, ET AL.,

Defendants-Appellees,
Cross Appellants,

and

ALBERT J. STRATTON and
LLOYDS OF LONDON,

Defendants-Appellees,
Cross-Appellants.

*

Appeal from the United States District
Court for the Southern District of Texas

(CA-H-79-1998)

*

(August 20, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local rule 47.6.

Having considered the supplemental brief, we conclude that the district court had ample grounds to dismiss the fourth amended complaint with prejudice and to deny the motion for a new trial. Accordingly, we hold that the district court acted properly, and AFFIRM the judgment below.

APPENDIX C

CAUSE NO. 80-35964

| | | |
|---|---|---|
| JAMES M. CATES | ] | IN THE DISTRICT COURT |
| | ] | |
| VS. | ] | OF HARRIS COUNTY, TEXAS |
| | ] | |
| G. C. PETTEY, III | ] | 151st JUDICIAL DISTRICT |

O R D E R

The motion of Plaintiff to retain this case upon the docket and the Court being of the opinion that same should be in all things granted,

IT IS ORDERED that this case be retained upon the docket, a Receiver appointed, a reasonable period of time for discovery and this case certified for trial on this day of April 4, 1986 at 10:30 o'clock a.m./p.m.

JUDGE PRESIDING

April 4, 1986.

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

*

No. 86-2749

*

JUDY CATES, INDIVIDUALLY AND
AS INDEPENDENT EXECUTRIX OF
THE ESTATE OF JAMES CATES,
Deceased,

Plaintiff-Appellant,
Cross-Appellee,

versus

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION, ET AL.,

Defendants-Appellees,
Cross Appellants,

and

ALBERT J. STRATTON and
LLOYDS OF LONDON,

Defendants-Appellees,
Cross-Appellants.

*

Appeal from the United States District
Court for the Southern District of Texas

*

ON PETITION FOR REHEARING SUGGESTION
FOR REHEARING EN BANC

(Opinion October 20, 1987, 5 Cir., 198 ,
_____ F.2d _____)

(December 1, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member on this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Sugestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-6

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| JUDY CATES, Individually and as Independent Executrix of the Estates of James Cates, Deceased, | ] | |
| Plaintiffs, | ] | Civil Action |
| vs. | ] | No. H-79-1998 |
| International Telephone and Telegraph Corporation, et al., | ] | |
| Defendants. | ] | |

ORDER

On December 16, 1985, the Court held a hearing on the Plaintiff Cates' Motion for Leave to File a Third Amended Complaint and the Defendants' Joint Opposition to Motion for Leave to File a Third Amended Complaint, Motion for Sanctions under Rule 11, and Motion for More Definite Statement under Rule 12. Counsel for all parties were present at the hearing. After

considering the argument of counsel and the pleadings filed with this Court, the Court ruled that for the reasons stated hereinbelow leave to file a Third Amended complaint should be denied and the Motion for More Definite Statement should be granted.

Pending before the Court is Plaintiffs' Motion for Reconsideration of the Court's Oral Findings. After careful review of the Plaintiffs' Motion For Reconsideration, this Court is of the opinion that the Plaintiff should be directed to comply with the Court's ruling of December 16, 1985.

It is therefore, ORDERED that the Plaintiffs' Motion for Leave to File a Third Amended Complaint and Plaintiffs' Motion to Reconsider are denied, and Defendants' Motion for More Definite Statement under Fed. R. Civ. P. 12(e) is in all things granted. It is further ordered that the Plaintiffs shall replead

in compliance with this Order.

A brief review of the procedural history of this case is in order. This case was originally filed against the current Defendants in September, 1979 by Mr. Cates ("Cates") on behalf of himself and two Texas partnerships of which he was a member, San Jacinto International ("SJI") and San Jac Association ("SJA"). In February of 1983, this Court granted Cates Leave to File a Second Amended Complaint and also granted the Defendants' Motions for Summary Judgement.

On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded the case to this Court so that it could address the effect of Cates'

> allegations (that his partners wrongfully conspired with the defendants and acted out of collusion with them, from improper or ulterior motives and not in an effort to further the best interests of the partnerships) on his right to maintain suit on the partnership causes of action, either derivatively in the name of the

> partnerships, or for his percentage of such claims, or alternatively to have action on the case deferred until a receivership application could be acted on in his state court suit or the partnerships winding up could be completed.

Cates v. International Tel. and Tel. Corp.,756 F.2d 1161, 1180(5th Cir. 1985).

The Court of Appeals expressly recognized that "Cates' pleadings and motions were extremly conclusory, confused and unclear. They would appear not to comply either with the requirements that the pleadings contain 'a short plain statement of claim' and 'be simple, concise and direct' . . . or with the requirement that allegations of fraud and circumstances constituting fraud' shall be specifically stated'. They were doubtless subject to motions for more definite statement under Fed. R. Civ. P. 12(e), and perhaps to motions to strike under Fed. R. Civ. P. 12(f)." Id. 1180. The Court of Appeals noted that plaintiff's statement

of any personal causes of actions were "clearly . . . defective as a matter of form." Id. at 1182.

After the Court of Appeals' opinion was rendered and became final, this Court held a status conference. Plaintiff's counsel stated that he wanted to file an Amended Complaint in compliance with the Fifth Circuit's opinion. The Third Amended Complaint now pending before this Court was then tendered as an exhibit to Plaintiffs' Motion for Leave to File an Amended Complaint.

Based on the Court's review of the proposed Third Amended Complaint filed by the Plaintiff and the Court's review of the Fifth Circuit's opinion, this Court finds that the Third Amended Complaint is defective as matter form. It fails to comply with Fed. R. Civ. P. 9, 8(a) and 8(e). The defects in the allegations of fraud and special damages present in the Second Amended Complaint have not been corrected.

The Court finds that the Plaintiff has failed to properly seperate his personal causes of action and any partnership claims alleged. Pursuant to the Court of Appeals' opinion quoted above, this Court directs that the Plaintiff cure these pleading defects.

The Court finds that the Plaintiff has attempted to add new claims and new parties not authorized or necessitated by the Court of Appeals' decision. Because of the death of Cates, the advanced stage of this litigation, Plaintiff's delay in raising these claims, and the limited issues which the Court of Appeals has remanded for decision, this Court is of the opinion that the Defendants would be unduly prejudiced by the addition of new parties and new claims.

Based on the findings of the Court, the Plaintiff is directed to replead in compliance with this Order as follows:

(a) The plaintiff shall allege specifically in compliance with Fed. R. Civ. P. 9 the fraud or conspiracy alleged to have been committed by the Defendants with Cates' partners;

(b) The Plaintiff shall allege specifically in compliance with Fed. R. Civ. P. 9 the specific acts of bad faith by Cates' partners in refusing him permission to file suit on behalf of the parternerships;

(c) The Plaintiff shall state specifically in compliance with Fed. R. Civ. P. 9 any special damages;

(d) The Plaintiff shall plead in compliance with Fed. R. Civ. P. 8(a) and 8(e) the facts supporting the jurisdiction of the Court;

(e) The Plaintiff shall not plead any claims which the Fifth Circuit has held were mooted by Cates' death. This shall specifically include allegations as to Cates' authority to file this suit or

to maintain the suit on behalf of the partnerships;

(f) The Plaintiff shall not add any new parties not included as parties in Plaintiff's Second Amended Complaint;

(g) The Plaintiff shall not add any new claims not specifically included in Plaintiff's Second Amended Complaint. This specifically includes those new claims added in the Third Amended Complaint including, but not limited to , claims for violation of the Racketeering Influences and Corrupt Organizations Act ("RICO"), and alleged Texas Deceptive Trade Practices violations.

(h) The Plaintiff shall comply with the Fifth Circuit's opinion by separating Plaintiff's personal claims and the factual basis for those claims for (sic) Plaintiff's claims on behalf of the partnerships;

(i) The Plaintiff shall comply with the Fifth Circuit's opinion and shall delete all references to "Cates" as a

contracting party. This Court and the Court of Appeals have already concluded that Cates is not a party to the contracts in this case.

It is further ordered that the Plaintiff shall have twenty days, from the date of this Order to file an Amended Complaint in compliance with this Order.

SIGNED AND ENTERED at Houston, Texas, on this the 7th day of Feb., 1986.

/s/ Carl O. Bue Jr.
Carl O. Bue Jr.
United States District Judge

# APPENDIX F

| Subpar. of Feb. 7, 1986 Order | Pars in Fourth Complaint, Tab 9 | Pars in Fifth Complaint, Tab 10 |
|---|---|---|
| (a), p.5. Tab 2, "fraud or conspiracy" of majority partners | par. 25, 26, 27 28, 29, 31, 35, 37, 38, 43(a), (e),(g),(h),(i) and pars. 46-50. | par. 20, 21, 22, 23, 24, 25, 28, 29, 30, 31, 37 (e),(g),(h),(i) and pars 40-50 |
| (b), p.5, Tab 2, "bad faith" of majority partners | par. 25, 26, 27, 28, 29, 31, 35, 37, 38, 43, (a), (e),(g),(h),(i) and pars. 46-50. | par. 2, 21, 22, 23, 24, 25, 28, 29, 30, 31, 37 (e),(g),(h),(i), and pars 40-50 |
| (c), p.5, Tab 2, "special damages". | pars. 44, 45, 53, 54. | pars. 38, 39, 45, 46. |
| (d), p.5, Tab 2, "jurisdiction" | Pars. 7, 8 | Pars. 4, 5 |
| (e), p.5, Tab 2, delete allegations re Cates authority | entire complaint- all allegations that Cates had authority to file suit re partnership deleted. | Pars. 4, 5 same as Fourth |
| (f), p.5, Tab 2, delete all parties not in 2nd Amended Complaint | Done, see entire complaint. | Done, see entire complaint. |
| (g), Delete all claims not in 2nd Amended complaint, p.6, Tab 2. | Done, see entire complaint. | Done, see entire complaint. |
| (h), Separate Plaintiffs personal claims from partnership claims. p.6, Tab 2. | Done, see pars 32-43 re partnership claims and pars. 51-52 re indivi- | Done, see pars. 26-37 re partnership claims and pars. 43- |

| | | |
|---|---|---|
| | dual claims. | 44, re individual claims. |
| (i), Delete all references to Cates as contracting party p.6, Tab 2. | Done, see entire complaint. | Done, see entire complaint. |

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | |
|---|---|
| JUDY CATES, Individually and as Independent Executrix of the Estate of James Cates, Deceased, | ) C. A. NO. |
| Plaintiffs, | ) H-79-1998 |
| versus | ) (JUDGE BUE'S UNIT) |
| ITT LIFE INSURANCE COMPANY and ALBERT J. STRATTON, | ) |
| Defendants. | ) |

PLAINTIFFS' FIFTH AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JUDY CATES, Individually and as Independent Executrix of the Estate of JAMES CATES, hereinafter referred to as the Plaintiff, complaining of ITT LIFE INSURANCE COMPANY and ALBERT J. STRATTON, on behalf of himself and certain other underwriters of LLOYDS; all hereinafter referred to as Defendants, and for cause

of action would respectfully show the Court as follows:

PARTIES

1. JAMES CATES was a natural person and a resident of the State of Texas. He was a general partner in SAN JAC INTERNATIONAL and SAN JAC ASSOCIATES, both partnerships, as hereinafter indicated. He was officer, director and shareholder in SAN JAC CORPORATION. CATES was at the time of his death a Plaintiff and Cross/Defendant. In March of 1984, James Cates died. Within a reasonable time thereafter, JUDY CATES was appointed Independent Executrix without bond, of and over the Estate of James Cates, deceased. While this case was pending in the United States Court of Appeals for the Fifth Circuit, a motion to suggest the death of James Cates and to substitute Judy Cates as representative of his estate, and in his place and stead, was made and granted. Such motion has been refiled in this Court. Therefore, Judy Cates, as the wife of James Cates at

the time of his death, now comes as an Individual Plaintiff in this action and also comes as the Independent Executrix of the estate of James Cates, deceased, in the place and stead of James Cates, deceased.

2. ITT LIFE INSURANCE CORPORATION (hereinafter "ITT LIFE") is a corporation authorized under the laws of the State of Texas for the purpose of engaging in the business of insurance, and has its primary and principal place of business in Minneapolis, Minnesota. ITT LIFE is both Defendant and Cross/Plaintiff in this cause of action.

3. ALBERT J. STRATTON, on behalf of himself and certain other underwriters of LLOYDS (referring to Lloyds of London and hereinafter referred to as "LLOYDS DEFENDANTS") are all registered, organized and based in the United Kingdom and are all presently Defendants in this suit.

JURISDICTION

4. Suit is brought under the diversity

of citizenship clause of the Constitution and laws of the United States, particularly 28 U.S.C. Section 1332. The Plaintiffs are resident citizens, as that term is defined by law, of the State of Texas. All of the Defendants, the ITT LIFE, HARTFORD and LLOYDS Defendants, are resident citizens, as that term is defined by law, of the states of the United States other than the State of Texas or of foreign countries. ITT LIFE is a Wisconsin corporation with its principal place of business in Minnesota. STRATTON and all of LLOYDS GROUP are United Kingdom entities and persons with their principal place of business in London, England.

5. Moreover, the Plaintiffs assert a cause of action against said Defendants under federal statutes, namely the United States Anti-Trust Laws, particularly the Act of Congress of October 15, 1914, 38 Stat. 731; 15 U.S.C. Sections 15 and 16 (the Clayton Act) and would show that this action arises under the foregoing

statutes, as hereinafter more fully appears.

FACTUAL BACKGROUND

6. ROBERT J. BOYER ("BOYER"), JAMES CATES ("CATES"), G. C. PETTY, III ("PETTY") and J. MICHAEL COLLINS ("COLLINS"), beginning in mid-1973, and acting by and through SAN JAC ASSOCIATES, a partnership ("SJA"), SAN JAC INTERNATIONAL, a partnership ("SJI") and SAN JAC CORPORATION, a corporation ("SJC"), were actively engaged in the marketing and sale of life, accident, health and medical expense insurance products to employers, their employees and eligible dependents participating in one of their multiple employer trusts.

7. The multiple employer trust concept had been primarily developed by James Cates. He not only was the innovator of this concept, but he brought about, through his genius, abilities and experience, the formulation and development of the master policies and

agreements that were necessary to carry out the formation and implementation of the multiple employers trust. These trusts were designed to market the insurance products (such as medical, hospitalization, health, accident, disability and life insurance), to handle claims, and, through the advantageous combination of employer groups, generate substantial savings to the policyholders and members of the various trusts, all at substantial profits, as hereinafter alleged, to the SAN JAC entities and the individual partners and principals. Cates personally generated over 80% of the income to the SAN JAC entities.

8. SJI AND SJC were primarily responsible for managing these trusts and received compensation for their efforts in managing the same. SJA had responsibility for marketing the various products and received commissions and income for such marketing efforts. SJC had general responsibilities relevant to the entire

process. All of these entities will be hereinafter referred to as the "SAN JAC entities", unless referred to individually. As further hereinafter alleged in more detail, Cates was a general partner with BOYER, PETTY and COLLINS in SJI; a general partner with BOYER AND PETTY and COLLINS in SJA; and was a shareholder, officer and member of the Board of Directors in SJC. All partnership agreements and corporate instruments, and subsequent modifications and amendments thereto, involving the SAN JAC entities are incoporated herein by reference.

9. SJA, SJI, and SJC entered into a series of agreements with ITT LIFE INSURANCE CORPORATION ("ITT LIFE") on or about the 1st day of October, 1976. These are: The General Agreement, which is referred to and incorporated herein by reference for all purposes; the Administrative Service Agreement, which is referred to and incorporated herein by

reference for all purposes; the Agency Agreement, which is referred to and incorporated herein by reference for all purposes; the Annex A to the Agency agreement (the Quarterly Performance Commission Agreement) which is referred to and incorporated herein by reference for all purposes; the Advance Commission and Loan Agreement, which is referred to and incoporated herein by reference for all purposes; the Agreement and Declaration of Trusts, which is referred to and incorporated herein by reference for all purposes; the Second SAN JAC Agreement of November, 1977, which is referred to and incorporated herein by reference for all purposes. In addition, the SAN JAC entities and ITT LIFE entered into reinsurance agreements with the LLOYDS Defendant.

10. The foregoing basic agreements were modified frequently by subsequent addenda, letter agreements, verbal agreements and a sustained and consistent course of dealing

between the parties. All of such modifications are referred to for all purposes and incorporated herein by reference.

11. The foregoing agreements, and the subsequent modifications, additions and deletions, basically described an arrangement whereby ITT LIFE undertook to issue master policies of insurance to the various multiple employer trusts through which SJA, SJI, and SJC marketed the various life, accident, health and medical expense insurance coverage to the covered employers, the employees, and the eligible dependents of those employers and employees participating in the American Employers Group Insurance Trusts (hereinafter referred to as "AET").

12. As part of the agreements, ITT LIFE obligated itself, and retained the right, to conduct an agressive marketing campaign in eleven States, whereby the insurance products marketed by SJA, SJI and SJC would be aggressively sold and marketed by

ITT Life through their own sales representatives, agents and independent contractors contracting with ITT LIFE. These states were Kentucky, Illinois, Indiana, Iowa, Nebraska, North Dakota, Michigan, Minnesota, Ohio, South Dakota and Wisconsin. The representations made by ITT LIFE to SJA, SJI and SJC were that the fruits of this aggressive marketing campaign would yield on a yearly basis, millions of dollars in gross premiums from the states to be marketed by ITT LIFE. It was upon the basis of these representations and commitments on the part of ITT LIFE that SJA, SJI and SJC were induced to enter into the contractual arrangement whereby they were restrained and prohibited from competing with ITT LIFE in marketing, directly, their insurance products in the eleven enumerated states. A further consideration flowed to ITT LIFE in the amount of $33,000.00 per month. The original basis upon which the negotiations

had proceeded was a payment of $25,000.00 per month and the additional $8,000.00 increment was specifically included for the marketing arrangement whereby ITT LIFE guaranteed and undertook the obligation to market the insurance products of SJI, SJA and SJC in the eleven enumerated states.

13. The marketing campaign promised by ITT LIFE never took place. As already admitted by ITT LIFE's officers, ITT LIFE did not even make an effort to market the products of SJA, SJC and SJI in those states. Thus, few, if any, of the insurance products were sold in the eleven states controlled by ITT LIFE. At the same time, the direct marketing of insurance products by SJA, SJI and SJC in those states was strictly prohibited by ITT LIFE under the threat of immediate cancellation of the master policies of insurance and under the termination clauses in the contractual agreements between the parties.

14. ITT LIFE, finally, at the insistance of SJA, SJI and SJC released the eleven enumerated states, set forth fully in the Agency Agreement, back to SJA, SJI and SJC for the purpose of marketing their insurance products. Concurrent with the release of the enumerated states, ITT LIFE reduced its premium retention to the previously agreed upon $25,000.00 level. However, the belated release of the enumerated states came too late. The deprivation of the gross income, which would have been generated by the marketing efforts of SJA, SJI and SJC, had they not been wrongfully precluded by the terms of the agreements and contracts with ITT LIFE from undertaking, would have generated enough cash surplusage so that all problems otherwise generated by the conduct of ITT LIFE and LLOYDS OF LONDON probably could have been overcome without the AET trusts' collapsing. In short, the absence of the

gross income from the eleven states - in which ITT LIFE forced SJA, SJI and SJC not to compete with them and not to market their products, and in which ITT LIFE had solemnly agreed to market the SJA, SJI and SJC products - was critical to the success and survival of SJA, SJI and SJC and their AET operations. By not even trying to market the products in those states - not making any effort whatsoever - the Defendant ITT LIFE knew that it would bring about severe financial damage to SJA, SJI and SJC and in all probability eventually cause the collapse of the multiple employers trust empire and organizations built so assiduously by CATES.

15. Another course of conduct causing severe, if not fatal, financial problems to the SAN JAC multiple employers trust empire built by CATES was that the ITT LIFE Defendants purposely and willfully delayed the payment of claims in order to recover the money for the payment of such

claims from the Reinsurer, the LLOYDS OF LONDON Defendant. It was the design and purpose of the ITT LIFE Defendants to never have its money involved or out at risk in the AET operations and to utilize premium income and/or reinsurance payments from LLOYDS to pay all claims without ITT LIFE having to underwrite or advance its own funds for the payment of any of the claims. This was contrary to the express provisions, and overriding intent and purpose, of the Agreements between the parties. It was also contrary to the established practice between the parties to said Agreements, to the custom and practice in the insurance industry and to the implied terms of the relevant contracts. Eventually, LLOYDS became a party to the improper actions of ITT LIFE and aided and abetted ITT LIFE's plan, practice and program of delaying the payment of the claims.

16. Because of the inordinate delay in the payment of claims, many of the

employers and small businesses began to withdraw from or terminate their participation in the employers trusts. The numbers resigning or withdrawing from the trusts, and the numbers of agents who were terminating their efforts to provide customers for the employers trust, began to accelerate, proliferate and multiply and, finally, this irreversible hemorrhaging in the numbers of AET trust members and policyholders played a substantial role in the eventual collapse of the SAN JAC multiple trust empire of CATES. The conduct of ITT LIFE, and eventually LLOYDS, in failing to make prompt payment of claims as required by the terms of the Agreements between the parties, the custom in the insurance industry, and the customary practice which developed between the parties, was intentional and done with the certain knowledge that the delay in payments would eventually cause the SAN JAC entities to collapse.

17. In addition, ITT LIFE assumed no insurance risk regarding the accident and health policies, and required that 100% of the risk be reinsured through a reinsurance treaty with the Defendant LLOYDS OF LONDON. This resulted in a larger portion of the premium dollars brought in as gross premiums being diverted from the SAN JAC entities, causing SJA, SJC and SJI to suffer an intensified burden and impediment upon their ability to sell and market their insurance products.

18. Also, ITT LIFE, concomitant with the terms of the contractual relationships, forced upon the SAN JAC entities, embarked upon a course of conduct inconsistent with the Insurance Code of the State of Texas by forcing the SAN JAC entities to undertake "local insurance company" functions such as billing premiums, collecting premiums, paying premium taxes, handling all

administrative functions, and paying claims without first being approved and registering with the Insurance Board of the State of Texas, thereby forcing SJA, SJC and SJI to carry out prohibited and illegal activity in the State of Texas. Because ITT LIFE imposed the illegal burden upon SJA, SJC and SJI to carry out "local insurance company functions" the legitimate functions of SJA, SJC and SJI were adversely affected, thus causing severe damage and harm to their ability to keep the Multiple Employer Trust empire viable, as well as adversely affecting the other insurance business interests of CATES.

22. As stated above, CATES, PETTY, COLLINS and BOYER were the original owners of the SAN JAC entities. However, in late 1977 or early 1978, BOYER withdrew from all partnerships and corporations. At the time most of the critical events related herein occurred, and most certainly at the time suit was initially instituted by

JAMES CATES, CATES, PETTY and COLLINS owned a one-third interest in SJI; CATES and PETTY owned a one-half interest in SJA and CATES, PETTY and COLLINS owned a one-third interest in SJC. Prior to the time suit was instituted by James Cates in this cause, the financial condition of the SAN JAC entities had become virtually unsalvageable; they were insolvent; they were generally unable to carry on their day-to-day affairs; and the winding-up process had been commenced with respect to SJI and SJA and a liquidation of SJC had been commenced. CATES was the general partner who undertook the winding-up and the liquidation process and he maintained control and responsibility for such winding-up and liquidation to the date of his death. At the time Cates commenced the suit against ITT LIFE and LLOYDS, Cates utilized his powers and responsibilities as "winding-up partner" and as the liquidator of SJC, to file and continue the prosecution of this suit.

20. Moreover, at the time suit was initially filed, PETTY gave his consent to the filing of suit but, after suit was filed, later withdrew such consent. At the time Petty gave his consent to the filing of suit, PETTY and CATES clearly controlled all of the SAN JAC entities. Moreover, when Petty made his post-filing attitude known (that is to withdraw his consent to the filing of said suit) Cates offered to purchase his and COLLINS' interest; offered to indemnify them from any liability, exposure, expenses or costs incident to the prosecution of the suit; offered to personally pay all the costs and expenses for the filing and prosecution of the suit and still give COLLINS and PETTY the benefits from said suit to which they might be entitled; and offered to take any other steps to relieve them of any further liability or exposure with respect to the filing and prosecution of said suit. Despite the fact that both

Petty and Collins publicly stated that the SAN JAC entities had no value to them and could not be salvageable, they inexplicably refused such offer and embarked upon a course of total opposition to the lawsuit; both in and out of Court.

21. It soon became clear that Collins and Petty (along with Boyer) had been all the time acting in collusion and concert with ITT LIFE and LLOYDS, to the detriment of the SAN JAC entities and to the detriment of Cates. They had conspired to undercut, subvert and eventually destroy the SAN JAC entities; CATES as an individual entity in the multiple employer trust field of insurance and in other fields of insurance; and to do other harm and damages, all as hereinafter alleged. One of the principal means of carrying out this conspiracy was to enter into a purported settlement agreement with the ITT LIFE Defendants the purpose of which was to undercut and wrongfully obstruct this lawsuit, which had initially been

brought by CATES on behalf of the SAN JAC entities. Your Plaintiffs hereby demand a copy of said so-called settlement agreements pertaining to such conspiracy and obstruction of civil justice; otherwise secondary evidence will be offered to prove the contents thereof.

22. As a part of the conspiracy referred to above, the said Defendants, together with Petty, Boyer and Collins, conspired to interfere with and unreasonably restrain commerce and trade with respect to the SAN JAC entities and to CATES; to violate the anti-trust laws of the United States and of the State of Texas, as hereinafter alleged; to bring about the destruction and total "squeeze out" of the SAN JAC entities and the Employer Trust Empire built up by CATES; to discredit CATES; and to destroy him as a viable competing personabe and entity in the insurance industry.

23. The settlement referred to above furnished no consideration to the SAN JAC

entities but was designed to provide substantial personal concessions and benefits to PETTY, BOYER and COLLINS, for their own selfish benefit and interest, and to the detriment of the SAN JAC entities.

24. PETTY, BOYER and COLLINS have taken every step possible to interfere with CATES' efforts to prosecute this suit on behalf of the SAN JAC entities. PETTY, BOYER and COLLINS conspired with the Defendants to interfere with CATES' efforts to prosecute the case on behalf of the SAN JAC entities despite the fact that their pleadings at one time in this case demonstrated that they believed that the cause of action asserted by CATES was a valid, viable and bona fide partnership cause of action (see their Cross-Action over against ITT LIFE filed in this lawsuit between their first Motin to Drop and their subsequent oral motion to the Court reasserting their Motion to Drop SJA, SJI and SJC as parties). In this

regard, Plaintiffs allege that the Defendants undertook such course of conduct, in collusion and conspiracy with PETTY, BOYER and COLLINS, because they sought to unlawfully acquire, take possession of, and utilize the very valuable multiple employer trust concepts, practices, agents, list of policyholders, marketing techniques, appropriate documentation, and other valuable insurance programs, policies and interests which had been devised by CATES; and that said Defendants, in furtherance of such collusion and conspiracy, wanted to discredit and squeeze CATES and his SAN JAC entities out of the insurance industry.

25. Indeed, the full extent of the collusion and conspiracy between PETTY, BOYER and COLLINS and the ITT LIFE and LLOYDS Defendants was demonstrated by the conduct of said parties toward the waning days of the SAN JAC entities as viable business entities. They joined and worked

together to interfere with the winding-up process. They joined and worked together to interfere with any efforts to have a Receiver appointed and to bring about a genuine and just protection of the SAN JAC interests. They joined and worked together to boycott CATES and to spread falsehoods and malicious untruths about CATES in the insurance industry. They cooperated, colluded and conspired to paint CATES with an image of incompetence, inability to engage in the insurance business, financial problems which he did not have, domestic problems which they claimed interfered with his ability to function in the insurance industry and in general embarked upon a campaign, through villification, misrepresentation, exaggeration, and half-truths, to discredit CATES to the extent that he would no longer be a viable and competing force in the insurance industry - particularly the multiple employer trust phase of that industry. In addition,

Defendants and their co-conspirators, PETTY, COLLINS and BOYER, tortiously interferred with the legitimate contracts and business opportunities of the SAN JAC entities and CATES, and committed other market-place torts, all as hereinafter alleged. Plaintiffs would show that the foregoing actions, while they were a continuation of the conspiracy and collusion which had already existed with respect to the SAN JAC entities, continued after those entities had ceased to function as viable entities and continued, separate and apart, from any adverse effects upon said SAN JAC entities, as a part of the collusion and conspiracy to disparage, and discredit and destroy CATES personally.

COUNT ONE
VIOLATIONS OF SHERMAN AND CLAYTON ACTS
AGAINST SAN JAC ENTITIES

26. This action is instituted pursuant to the Act of Congress of October 15, 1914, 38 Stat. 731; 15 U.S.C., Sections

15 and 24 (the Clayton Act) to recover treble damages and obtain injunctive relief for the injuries sustained by all Plaintiffs resulting from the acts and omissions of the Defendants' violations of the Acts of Congress of July 2, 1890; 26 Stat. 290; 15 U.S.C. Sections 1 and 2 (the Sherman Act).

27. Plaintiffs hereby refer to all allegations under Factual Background above alleged and they are incorporated herein by reference the same as if copied in full, including paragraphs 1 - 32. In addition, Plaintiffs would show that all requirements concerning market share, impact upon interstate commerce, and other procedural and statutory requirements for the filing of a suit under the anti-trust laws are present in this case.

28. Defendants, together with PETTY, BOYER and COLLINS, acted in conspiracy, collusion and in concert to force upon SJA, SJC and SJI provisions in the basic agreements between ITT LIFE and SJA, SJI

and SJC which constituted an illegal restraint of trade in that they forced upon the SAN JAC entities a clause in said contractual documents restraining and restricting SJA, SJC and SJI from selling their products and competing for business in the States of Kentucky, Illinois, Indiana, Iowa, Nebraska, North Dakota, Michigan, Minnesota, Ohio, South Dakota and Wisconsin. The provisions of such documents, together with the practice established between the parties, established that the Defendants locked out SJA, SJC and SJI from engaging in trade in those particular areas; constituted an illegal restraint of trade; constituted an attempt to monopolize the insurance industry in those particular states; constituted an illegal boycott, as that term is defined in anti-trust law; with respect to doing business in those particular states, constituted an illegal tying-arrangement in that it tied-in the agreement of the SAN JAC entities not to

do business in those states with the legitimate provisions in said agreements; and constituted an illegal pricing and territorial agreement, all in violation of the anti-trust laws of the United States as hereinbefore allged.

29. Said Defendants at all times material hereto have conspired, acted in collusion and acted in concert, with themselves, PETTY, BOYER, COLLINS and others to squeeze out SJA, SJC, SJI and CATES from the insurance industry, their participation in multiple employers trust phase of the industry and to otherwise destroy SJA, SJC and SJI as viable business entities in the employment and insurance field.

30. The Defendants began a clandestine and concerted course of conduct and campaign to determine the inner workings of the multiple employer trust marketing program and the management policies of such trusts established by CATES and undertook such campaign with the intent of

establishing within the United States, not only the eleven states over which it had exclusive control, but all states of the Union, a program of insurance marketing utilizing the employers trust concept, based upon that used by the SAN JAC entities, and to concomitantly prohibit and exclude SJA, SJC, SJI and CATES from competing with them and to destroy them as effective and viable competitive entities. In effect, the Defendants, in concert, collusion and conspiracy, attempted to "take over", as that term is known in anti-trust law, SJA, SJC and SJI by surreptitious, clandestine and anti-competitive activities and efforts.

31. Plaintiffs would show that the specific acts of conspiracy, including overt acts and objective manifestations of conspiracy which can be implied in law (such as conscious parallelism) and other specific acts of conspiracy, which the Plaintiffs now allege that these Defendants undertook, or were involved in,

and concerning which these Defendants acted in conspiracy, either jointly with each other, with other unnamed parties, and/or with PETTY, BOYER and COLLINS, are as follows: (i) they imposed upon the SAN JAC entities a tie-in arrangement whereby the SAN JAC entities could not market their products in eleven major states, while retaining such marketing rights under the exclusive control of ITT LIFE; this tie-in arrangement constituted an unreasonable restraint on trade and constituted an overt act typifying the conspiracy; (ii) after imposing such tie-in arrangement upon the SAN JAC entities, the Defendants then willfully, and in flagrant disregard of their contractual obligations, did not even attempt to market the SAN JAC products in such eleven state area; this overt inaction demonstrated their plan and conspiracy to bring down the SAN JAC entities in due time because they knew that without the gross income that could

have been generated in that eleven state area, the long term existence of the SAN JAC entities would be doomed; and this conduct in not attempting to even market the SAN JAC products in that eleven state area has already been established by the testimony of the principals in ITT LIFE, whose depositions have been taken; (iii) as another overt act in the carrying out of the overall conspiracy, the Defendants and their co-conspirators purposely and willfully slowed down the payment of legitimate claims submitted by the insured employees of the various employers who participated in the said multiple employers trust; the Defendant knew by slow-paying the claims that they would ultimately bring about a fatal hemorrhaging of the members of AET and thus, in due time, bring about the economic destruction of the SAN JAC entities and their founder, CATES. (iv) another overt act of the Defendants and their co-conspirators was the fact that

Defendants insisted upon inordinately and unreasonably high premium rates and forced the SAN JAC entities to illegally engage in conduct as an underwriter and insurance company and forced them to seek and obtain such unreasonably and inordinately high rates; the Defendants knew that by forcing the SAN JAC entities to undertake such actions, they would eventually dislodge many of their customers and participating employers, and that they could by such overt actions, eventually bring about the economic destruction of the SAN JAC entities and their founder, CATES. (v) the Defendants and their co-conspirators forced the SAN JAC entities, on repeated occasions, into acting in other respects as an "insurance company" in violation of the Insurance Code of the State of Texas; (vi) another overt act, as manifested by the action of Defendants, is that after CATES resolved to protect the lawful rights of the SAN JAC entities by instituting suit on their

behalf, they brought PETTY, BOYER and COLLINS further into the conspiracy and concert-in-action by inducing them to enter into secret and confidential settlement agreements, wherein they offered substantial economic inducements personally, and in return, secured their agreement to oppose the efforts of CATES to sue on behalf of the SAN JAC entities in this case; PETTY, BOYER and COLLINS took every action they could to forestall any such efforts; they entered into a settlement agreement which was clearly to the detriment of the SAN JAC entities; and Defendants further induced PETTY, BOYER and COLLINS, to wrongfully work with said Defendants in other respects to defeat and block CATES' attempt to seek the lawful and just recovery due the SAN JAC entities; (vii) furthermore, in carrying out such conspiracy, the Defendants induced PETTY, BOYER and COLLINS, and acted in collusion with them, to oppose any winding-up, to abandon any further

efforts to manage the SAN JAC entities and to bring about the utter and total abandonment of the SAN JAC entities; these actions and omissions have made it necessary for the Plaintiffs to seek the appointment of a Receiver in this and the State Court action; (viii) as further manifestations of said conspiracy, the Defendants induced and required their co-conspirators, PETTY, BOYER and COLLINS, to resist offers by CATES e.g. to buy out their interests in the SAN JAC entities; to indemnify them; to protect them against any adverse consequences from the bringing of this lawsuit; to in all respects make them "whole" so that they would not lose anything by CATES proceeding to sue on behalf of the SAN JAC entities and the said Defendants required and induced the said PETTY, BOYER and COLLINS to resist such offers even though PETTY, BOYER and COLLINS had repeatedly stated on publicly that the SAN JAC entities had no value; that they were

abandoning same; that they did not intend to have anything else to do with the SAN JAC entities; and that they could see no economic benefit to them in trying to salvage the SAN JAC entities; (ix) as a further manifestation of said conspiracy, the Defendants induced and required the said PETTY, BOYER and COLLINS to remove critical documents, namely most all of the business documents of the SAN JAC entities, from and beyond the reach of this Court, to a warehouse in Odessa, Texas; that the moving of such documents was done without the knowledge or consent of CATES and was done surreptiously and was carried out for the primary purpose of carrying out the conspiracy between the Defendants and PETTY, BOYER and COLLINS to frustrate, impede and forestall the lawsuit brought by CATES on behalf of the SAN JAC entities against the Defendants ITT LIFE and LLOYDS; (x) as a further overt act or acts manifesting such conspiracy, the Defendants, along with

their co-conspirators, PETTY, BOYER and COLLINS, and other co-conspirators, undertook a campaign to discredit and boycott CATES and have CATES discredited and boycotted in the insurance industry by falsely communicating and spreading untruths, half-truths, exaggerations, false innuendos and other misinformation about CATES throughout the insurance industry; it was the purpose of the conspiracy to economically destroy CATES and thus prevent him from ressurrecting the SAN JAC entities and/or starting new entities based upon the same principles, formulations and methodology as had been used by the SAN JAC entities; as a part and parcel of the overall conspiracy, the Defendants deemed it necessary, in order to ensure that the destruction of the SAN JAC entities remained permanent, to also economically destroy their founder, CATES, and the campaign of falsehoods and misinformation about CATES and the villification of him, was designed to

accomplish that end; (xi) by the same token, said Defendants along with their co-conspirators, which included others as well as PETTY, BOYER and COLLINS, sought to boycott the SAN JAC entities and CATES in the insurance industry and, through their campaign of slander and villifiction, to extend the boycott throughout the entire industry in the United States; (xii) Defendants and their co-conspirators, PETTY, BOYER, COLLINS and others, manifested their conspiracy through parallel conduct; that even before CATES filed the suit on behalf of the SAN JAC entities, PETTY, BOYER and COLLINS had begun to work with the Defendants ITT LIFE and LLOYDS and had begun to work together in a parallel effort to carry out their unlawful restraint of trade; that, most certainly, once CATES filed the suit, the conspiracy became more vigorous and malicious; the conduct of the Defendants and PETTY, BOYER and COLLINS from that point forward was

totally and consciously parallel and all of such conduct, throughout the proceedings, and at all relevant times, was consciously parallel and such parallel activity was against the best interests of the SAN JAC entities; therefore, such consciously parallel conduct was, under the law, an overt and implied manifestation of the conspiracy which is alleged herein, i.e. to unreasonably restrain trade with respect to the SAN JAC entities and CATES and to bring about the eventual economic destruction of the SAN JAC entities and CATES as viable entities and personages in the insurance industry.

32. All of the violations of the anti-trust laws, and the conduct complained of herein, proximately and/or actively caused the damages hereinafter separately alleged, infra. Without any question, the conduct of Defendants justifies the imposition of the maximum amount of multiple of actual damages permitted by anti-trust law, namely treble

damages.

COUNT TWO
BREACH OF CONTRACT BY DEFENDANTS
WITH RESPECT TO SAN JAC ENTITIES

33. Paragraphs 1 - 32 are incorporated herein by reference.

34. The Defendants, acting individually, collectively and in combination and collusion with each other and with others, have breached the contracts and agreements by and between the parties hereto, particularly the referenced documents between ITT LIFE and LLOYDS, on the one hand, and SJA, SJI, SJC, on the other hand, as follows:

a. In failing to even attempt to market the SAN JAC products in the eleven states provided for in the various base documents, all to Plaintiffs damages;

b. In failing to pay claims timely as they expressly or impliedly agreed to do under the terms of said contracts, as modified, and as established by the practice between the parties and the

custom in the insurance industry, all to the Plaintiffs damages;

c. In breaching and becoming liable under the indemnity terms and other provisions of paragraph 17 of the "Administrative Service Agreement", and in failing to comply therewith. Said Administrative Service Agreement provisions states that ITT LIFE will be responsible for any and all loss "resulting from the failure of ITT LIFE to perform any acts required under this Administrative Services Agreement . . . ." In that regard, Plaintiffs would show that the Defendants did directly violate said Agreement and its exhibits by failing to pay claims promptly and properly and generally in failing to maintain a solvent position for the payment of claims to the various claimants under the Master Plan and the various policies that were put into force and effect;

d. By virtue of the conduct of the ITT Defendant in attempting to avoid risks

with regard to the insurance of accident and health policies, and in conducting themselves so as to force upon the Defendant LLOYDS most of the risks by calling upon the reinsurance provisions before paying the claims, all in violation of the various referred to documents and contracts herein. The reinsurance treaty that was negotiated was a further burden and impediment to SJA, SJC and SJI, in that a larger portion of the premium dollar brought in as gross premiums was diverted from the SAN JAC entities for the benefit of the Defendant ITT LIFE.

e. By forcing, in the manner in which they undertook to conduct themselves under the contractual relationships, SJA, SJI and SJC into the position of being a "local insurance company" in violation of the Insurance Code of the State of Texas and other laws. This occurred through the actions of the Defendants in forcing the SAN JAC entities to undertake such functions as billing premiums, collecting

premiums, paying premium taxes, handling administrative functions, paying claims and doing other things which the Defendants ITT LIFE and LLOYDS should have been doing under the agreements, the custom and practice in the insurance industry and the laws of the State of Texas and other states affected thereby.

35. That by reason of all of the foregoing breaches of contracts, the SAN JAC entities were caused to suffer and sustain the damages all as hereinafter alleged, infra.

COUNT THREE
MISCELLANEOUS CAUSES OF ACTION
ASSERTED ON BEHALF OF SAN JAC ENTITIES

36. The allegations hereinabove asserted in paragraphs 1-35 are hereby adopted under this Count and are incorporated herein by reference.

37. Plaintiffs would show that the Defendants, acting in collusion and conspiracy with PETTY, BOYER and COLLINS, were guilty of the following conduct and causes of action with respect to the SAN JAC entities, to-wit:

a. **Tortious interference with the contracts of the SAN JAC entities.** That upon information and belief, the Defendants, acting individually and in conspiracy and collusion, set upon a course of conduct to interfere with the contracts between the SAN JAC entities and their insurance agents, brokers, and other marketing people who were marketing the SAN JAC products throughout the contry. In

addition to the obvious restraint of trade with respect to the eleven states named in the allegations under Count One, the Defendants conspired and colluded to interfere with agency, brokerage, and other insurance contracts and other contracts related to the marketing of the SAN JAC products in the other states of the Union. They used disinformation, tactics of confusion with which to discredit and disparage the SAN JAC entities and CATES, the person most responsible for the credibility and success of the SAN JAC entities and the multiple employer insurance trust enterprises, and in other respects took steps to tortiously interfere with those contracts. In addition, the Defendants interfered with other contracts between the SAN JAC entities and various other entities in the insurance industry. They effectuated such tortious interference in the same manner and with the same purpose and goal in mind - discrediting, disparaging and

economically destroying the SAN JAC entities and CATES in the insurance industry.

b. **Tortious Interference With the Use And Enjoyment of Property Rights.** Plaintiff would show that the SAN JAC entities owned and controlled numerous property rights, both tangible and intangible, which included list of customers, lists of agents, lists of brokers, lists of marketing sources, marketing plans and techniques, and other formulations which were peculiar and indispensible to the multiple insurance trust concept and operation. The Defendants, acting individually and in cullusion and conspiracy, set upon a course of conduct to interfere with SAN JAC's and CATES' use and enjoyment of those property rights and did, by and through willful and tortious conduct, and through the use of tactics in restraint of trade, all as alleged above, slanderous statements, disinformation and

misinformation, and other improper and tortious tactics, thereby interfere with the use and enjoyment of those property rights.

d. **Tortious Interference With Prospective Advangages.** Plaintiff would show that the SAN JAC entities, because they were a pioneer and model in the multiple employers trust industry, and because they had successfuly brought about the development and build-up of one of the most successful and largest multiple employer trust companies in the United States, had numerous prospective advangages in the insurance industry and the Defendants, both individually and in conspiracy and collusion, set about to destroy, take away, tortiously interfere with, and discredit such prospective advantages on the part of the SAN JAC entities and their founder, CATES. They accomplished this through the same anti-trust, breach of contract and tortious conduct, all as alleged above.

e. **Tortious Obstruction of Justice.** Plaintiffs would show that the Defendants, individually, and in collusion and conspiracy with PETTY, BOYER and COLLINS, all as set forth above, set about on a course of conduct to interfere with CATES' efforts, on behalf of the SAN JAC entities, to prosecute their just cause of action against ITT LIFE and LLOYDS Defendants. Through their collusive efforts, described above, they have interfered with, impeded, and sought to prevent the efforts of CATES to recover amounts due the SAN JAC entities from the ITT LIFE and LLOYDS Defendants and thus have caused severe damages to the SAN JAC entities.

f. **Tort of Outrageous Conduct.** The conduct of the Defendants herein, in dividually and in collusion and conspiracy, is so willful, pernicious and outrageous as to justify the imposition of damages, particularly in view of the

malicious taint involved in their conspiratorial and collusive efforts. Their effort to squeeze out the SAN JAC entities and CATES and to restrain trade and to willfully breach contracts and to commit intentional torts, went far beyond the usual and normal nature of those causes of actions and violations; the zeal, perniciousness and maliciousness with which they sought to utterly destroy the SAN JAC entities and CATES in the insurance industry justifies recovery for the tort of outrageous conduct.

g. **Misappropriation of Trade Secrets.** Through the conspiracy with PETTY, BOYER and COLLINS, the ITT LIFE and LLOYDS Defendants were able to obtain secret lists with respect to marketing, marketing techniques, agents, brokers, and other means of marketing products, such as the SAN JAC products, from the SAN JAC entities and CATES in an unauthorized, clandestine and improper manner. All of this information constituted the trade

secrets of the SAN JAC entities and CATES and was wrongfully appropriated, expropriated and taken from the SAN JAC entities and CATES by the Defendants, all to the damages of the SAN JAC entities.

h. **Tortious Fraud.** Plaintiffs would show that the Defendants are guilty of tortious fraud in this case, both directly and as part of the on-going conspiracy and concert- in-action. The overt acts of fraud and the manifestations of fraud, include all those specifically listed and set forth in paragraph 31 above, which paragraph is incorporated into this paragraph by specific, as well as general, reference. In addition, other specific acts of fraud include the following: (i) at the time the representations and inducements leading up to the execution of the contracts in question were made by the Defendants that they would market SAN JAC products in said eleven state area the Defendants had intention of fulfilling them; therefore, said representations were

therefore false and fraudulent. (ii) At the time the contracts between the Defendants and the SAN JAC entities were executed, and leading up to the execution thereof, the Defendants, through their agents and employees, represented that they would pay claims incident to the administration of the multiple employers trusts on a timely basis. At the time such representations were made they were false and the Defendants had no intention of fulfilling such representations. Indeed, the ITT LIFE Defendants, from the inception, intended to avoid having any of their money involved in the transactions or at risk, even though it was their obligation, as an underwriter, to advance monies for the payment of claims and to take such risks. Because the Defendants had no intention of performing such commitments at the time they made them, such representations were fraudulent and constituted fraud. (iii) The Defendants also represented to the SAN JAC entities

that the SAN JAC entities would carry out only legitimate functions, such as management of the American Employers Trust and the multiple employers trusts, and would not be required to engage in "insurance functions". At the time such representations were made, as their subsequent conduct disclosed, the Defendants had no intention of fulfilling such representations but, on the contrary, intended to cause, require and force the SAN JAC entities and CATES to engage in "insurance activities", in violation of the laws of the State of Texas and in violation of the custom and practices in the insurance industry. Because such representations were made without any intention of fulfilling them, they were fraudulent and constituted fraud. (iv) The Defendants also represented, as an inducement to the execution of the contracts in question, that they would not unduly or unnecessarily disrupt the rate schedules which had been devised for the

implementation of the multiple employers trusts and would not require or force the Plaintiffs to unreasonably and unnecessarily increase the rates. On the contrary, at the time said Defendants made such representations they had no intentions of fulfilling them and, at that time, had the present intention of eventually destroying the SAN JAC entities and CATES, as viable business and economic entities, and personables by unreasonably forcing the SAN JAC entities to seek and obtain unreasonable rate increases, with the certain knowledge that, by doing so, they would eventually be destroyed as competitive entities. Such representations were therefore false and fraudulent and constituted fraud. (iv) All of the specific sub-paragraphs of allegations contained in paragraph 32 above, did, in addition to being a part of the conspiracy to unreasonably restrain trade and violate the anti-trust laws, constitute fraud and were fraudulent in nature, and, as stated

above, Plaintiffs adopt such and every allegation therein as an allegation of overt fraud committed by the Defendants herein, together with their co-conspirators, PETTY, BOYER and COLLINS, and other co-conspirators.

i. **Tortious Violation of Fiduciary Obligations.** By virtue of the various contracts and agreements the Defendant ITT LIFE and LLOYDS became the underwriter and reinsurer of the AET and the SAN JAC entities. By virtue of said agreements, and the relationship in general, fiduciary obligations were imposed upon said Defendants to carry out their obligations faithfully and in the best interests of the multiple employers trust. Moreover, they became the fiduciary of various employers that participated in the trusts, together with the employees who were the insureds. By virtue of the conduct described above, the Defendants violated these fiduciary obligations and are therefore liable for the tortious breach

of such fiduciary obligations. In addition, the Defendants conspired and colluded with PETTY, BOYER and COLLINS, who had fiduciary obligations to CATES as his partners and fellow shareholders and board members in the various SAN JAC entities. Said Defendants induced, caused, forced and required the said PETTY, BOYER and COLLINS, to breach said fiduciary obligations and are therefore liable and responsible for same, particularly since the breaches of said fiduciary obligations was a part and parcel of the overall conspiracy and concert-in-action engaged in by the Defendants and PETTY, BOYER and COLLINS and other unnamed co-conspirators.

j. Plaintiffs would show that all of the conduct alleged in this paragraph 37 was a proximate and/or producing cause of the damages hereinafter alleged.

GROSS DAMAGES TO SJA, SJI AND SJC ENTITIES ARISING OUT OF THE FOREGOING ALLEGATIONS

38. All of the allegations of paragraphs 1 thru 37 are adopted and

incorporated herein for all purposes.

39. Plaintiffs would show that SJA, SJI and SJC did, by reason of the anti-trust, breach of contract, tortious and miscellaneous conduct alleged above, sustain the following damages:

a. Loss of profits from the trusts and from the SAN JAC businesses that were caused by the conduct of the Defendants for the past six years at $2 million per year, or $12 million dollars;

b. Loss of reasonable profits in the future for a reasonable period of ten years from this date at the rate of $2 million per year, or $20 million dollar additional loss;

c. At the end of the 10 year period the SAN JAC entities would have had, but for the conduct of the Defendants, a net discounted reasonable market value of $15 million dollars and, since said entities were destroyed by the conduct of the Defendants, Plaintiffs are entitled to recover said value;

d. $2 million in monies actually paid by SJA, SJI and SJC for claims which should have been paid by Defendants and/or for monies advanced or diverted by the Defendants contrary to the various contracts, documents, all to the unjust enrichment of the Defendants;

e. Loss of net profits from the eleven states over which Defendants retained exclusive rights to market, or approximately $1.2 million per year, plus $360,000.00 per year in net administrative fees, for the past six years to date, or $9.36 million dollars;

f. Loss of net profits from said eleven states for a reasonable period into the future (10 years) or $15.6 million dollars (1.56 million per year);

g. Plaintiffs seek treble damages under the anti-trust laws of the United States and hereby request that all of the foregoing actual damages be trebled in accordance with the terms and provisions

of the anti-trust laws sued under.

h. Plaintiffs also seek attorneys fees made necessary by this suit in the reasonable sum of $3 million dollars;

i. In addition to the actual damages, penalties, attorneys fees and other amounts due, all as alleged above, with respect to damages due the SAN JAC entities, the Plaintiffs would show that SAN JAC entities are entitled to recover punitive and exemplary damages. This is so because the conduct of the Defendants was intentional, malicious and particularly outrageous and pernicious and was obviously tainted with, and motivated by, malice. Plaintiffs would show that the SAN JAC entities should recover a substantial amount of punitive damages so that the Defendants can be properly punished for their willful and malicious misconduct, and so that these Defendants, and other entitles similarly situated, will be deterred from repeating such conduct in the future. The amount of punitive damages in order to be adequate enough to

accomplish these goals, should be no less than $40 million.

j. And the SAN JAC entities are entitled to pre-judgment interest.

COUNT FOUR
ALLEGATIONS WITH RESPECT TO RIGHT OF PLAINTIFFS TO SUE FOR ALL OR PROPORTIONATE SHARE OF DAMAGES DUE SAN JAC ENTITIES

40. All of the allegations contained in paragraphs 1-39 are adopted and included herein by reference, the same as if copied in full herein.

41. Plaintiffs now assert the allegatons which justify the Plaintiffs bringing this suit for all the damages due the SAN JAC entities or, in one form of relief or the other, for Plaintiffs' proportionate share of the damages due of the SAN JAC entities:

a. Even if this suit by CATES was not initially formally authorized on behalf of the SAN JAC entities, BOYER, COLLINS and PETTY eventually filed, on behalf of the SAN JAC entities, a counterclaim or cross-action against the ITT LIFE

Defendant, which cross-action in fact was substantially similar to the allegations asserted by CATES on behalf of the SAN JAC entities in the original suit; in turn, the ITT LIFE Defendant cross-sued over and against PETTY, BOYER and COLLINS and the SAN JAC entities; therefore, issue was joined between CATES, PETTY, BOYER and the SAN JAC entities,on the one hand, and the ITT LIFE Defendant, on the other hand, and, once said issue was joined by such parties on substantially the same grounds, such issues could not be settled, compromised or dismissed by this Court without the unanimous consent of all partners. Since neither CATES, nor his estate, has ever consented to any compromise, settlement or dismissal, the lawsuit on behalf of the SAN JAC entities is still a viable lawsuit. In this connection, Plaintiffs especially plead the Uniform Partnership Act, Art. 6132 B, R.C.S. (hereinafter Texas "TUPA") and the Partnership Agreements pertaining to SJA and SJI. See **Cates v. ITT Life,** 756 F.2d

1161, 1175-1176.

b. As suggested in *Cates*, 756 F.2d at pp. 1179 and 1180, the Plaintiffs have previously sought in this case to join the SAN JAC entities and PETTY, BOYER and COLLINS as Defendants in order to make recoveries on behalf of the SAN JAC entities appropriate. Even though the Court has declined to allow Plaintiffs to retain the SAN JAC entities, and PETTY, BOYER and COLLINS in this suit as Defendants, the actions of Plaintiffs in atttempting to join the SAN JAC entities and the non-consenting partners (that is non-consenting to this suit), giving them notice of this suit and giving them the opportunity to remain in this suit, obviates the fact that this Court has found that CATES did not initially have authority to bring this suit. The Plaintiffs are thereby, pursuant to the mandate in *Cates v. ITT LIFE*, 756 F.2d 1161 (5 Cir. 1985), entitled to sue for all of or at least their proportionate

share of the damages that are due the SAN JAC entities by the Defendants.

c. CATES and now the Plaintiffs have repeatedly offered to buy out PETTY, BOYER and COLLINS on a fair basis, and, more importantly, offered to indemnify them from any costs of court, liability or attorneys fees; therefore the Plaintiffs now assert that they should be allowed, under prevailing law, to proceed to recover all, or at least their proportionate share, of the damages due the SAN JAC entities by ITT LIFE and LLOYDS, regardless of the fact that PETTY, BOYER and COLLINS may not consent to said lawsuit.

d. In view the allegations in this Complaint, which need not be repeated but are incorporated herein, concerning the improper, ulterior and bad faith motives of PETTY, BOYER and COLLINS, in opposing the lawsuit against ITT LIFE and LLOYDS Defendants on behalf of the SAN JAC entities, and in view of the allegations

of their lack of good faith with respect to the best interests of the SAN JAC entities, and in view of the allegations of their conspiracy and collusion with the ITT LIFE and LLOYDS Defendants, and in view of the allegations of their other improper conduct, actions and intents, the Plaintiffs are entitled to, bring suit for all the damages due the SAN JAC entities or, at the least, their proportionate share of the damages due the SAN JAC entities from the ITT LIFE and LLOYDS Defendants. Specifically, Plaintiffs would show that PETTY, BOYER and COLLINS conspired with the Defendants in this cause to undermine and eventually destroy the SAN JAC entities from almost the very inception and have conspired with them to commit the other wrongs which have been alleged against the Defendants under all counts above, and were guilty of bad faith insofar as the interests of the SAN JAC entities were concerned, while at the same time taking advantage of the situation to

gain personal income and consideration for themselves, all to the detriment of the SAN JAC entities. Moreover, said PETTY, BOYER and COLLINS, in order to carry out the conspiracy with the ITT LIFE and LLOYDS Defendants, refused and failed to act diligently and in good faith on behalf of the SAN JAC entities; they abandoned said entities; they left them to dissipation and economic death by neglect; and they, in all respects, contravened their fiduciary obligations to take care of and seek to obtain the best interests for said SAN JAC entities. Throughout their relationship with the SAN JAC entities, even before suit was brought by CATES on behalf of the SAN JAC entities, PETTY, BOYER and COLLINS were governed and controlled by improper, ulterior and self-serving motives and this became even more evident when, after CATES filed suit, they actively sought to forestall and preclude such suit by conduct which was not motivated by the best interests of the

SAN JAC entities, but was motivated by selfish desires and improper and ulterior motives; they took all this action even though they knew that the suit brought by CATES, on behalf of the SAN JAC entities against the ITT LIFE and LLOYDS Defendants, would be advantageous to said SAN JAC entities and, indeed, would be in their best interests and would be the only way in which the said entities could become solvent and once again viable business entities. The overt acts and objective manifestations of the above alleged improper, ulterior and bad faith motives and fraud, conspiracy and collusion with the Defendants in this cause, and their failure to act diligently with respect to the best interest of the SAN JAC entities, and their motives and actions designed to benefit themselves personally, to the detriment of the SAN JAC entities, are as follows: (i) all of those specific overt acts and omissions which are listed in paragraph 31 and 47

above are also overt acts and omissions which demonstrate the improper, ulterior and bad faith motives, fraudulent conduct and actions contrary to the best interests of the SAN JAC entities on the part of PETTY, BOYER and COLLINS. Such specific allegations, contained in such paragraphs are expressly incorporated in this paragraph as if copied verbatim herein. (ii) In refusing to bring suit against the ITT LIFE and LLOYDS Defendants even though they publicly, and to a number of persons, expressed their belief that the said ITT LIFE and LLOYDS Defendants were guilty of the type of misconduct alleged by the Plaintiffs in this suit and that the damages caused by such misconduct on the part of the ITT LIFE and LLOYDS Defendants would be substantial. (iii) The actions of PETTY (along with CATES) in expressly authorizing a suit, in writing, against ITT LIFE and LLOYDS for the very actions which are the subject matter of this suit, thus indicating that PETTY,

contrary to his subsequent position, genuinely believed that there was a valid cause of action against the ITT LIFE and LLOYDS Defendants which would yield substantial damages to the SAN JAC entities and would thus be in their best interests to pursue. (iv) The actions of PETTY, BOYER and COLLINS, by and through their attorney, and on behalf of the SAN JAC entities, in filing a counter-claim and/or cross-action against ITT LIFE, asserting virtually the same causes of action that had been asserted in this case by CATES, thus indicating - particularly in view of the requirement under Rule 11, F.R.C.P., that all the allegations be made in good faith and proper upon a factual basis - that a genuine cause of action did and does exist against the ITT LIFE Defendant and that it would be in the best interests of the SAN JAC entities to pursue said cause of action. (v) The actions of PETTY, BOYER and COLLINS - despite public and numerous statements

that the SAN JAC entities were insolvent, bankrupt, could not be salvaged, and that they did not want to have anything to do with said entities and were going to abandon same - in refusing to accept CATES' offer of a buy-out from them, with an indemnity, indemnifying them from any exposure that might arise out of his prosecution of the suit in this case on behalf of the SAN JAC entities; in refusing to allow CATES to take over said SAN JAC entities and pursue their remedies even though, if he were successful, it would obviously be to their benefit as much as to his; and, without any reasonable explanation or justified business reasons whatsoever, in refusing to transfer the SAN JAC interests to CATES in return for his offered promise to see to it that they would receive their share of any recovery against the ITT LIFE and LLOYDS Defendants in this case and that they would not have to put up any of the costs or expenses incident to the

litigation and that CATES would completely and totally finance the litigation; despite all these offers and assurances, and despite their expression to numerous people that they really did not care what happened to the SAN JAC entities, the said PETTY, BOYER and COLLINS obstinately and unjustifiably, and without any explanation or good business reason whatsoever, refused to transfer said interests to CATES; refused to allow him to proceed with the lawsuit against ITT LIFE and LLOYDS, which obviously was in the best interests of the SAN JAC entities (at the least the SAN JAC entities had "everything to gain and nothing to lose"); and not only did all that, they aggressively, obstreperously, maliciously, and without any reason or cause whatsoever, took every affirmative step they could to fight the suit and, indeed, took the final, disloyal step by fraudulently colluding and joining the conspiracy of the ITT LIFE and LLOYDS Defendants to economically destroy the SAN

JAC entities, along with CATES; there is only one inference that can be drawn from these overt acts and that is that the said BOYER, PETTY and COLLINS were consumed by "improper, ulterior and bad faith motives", which were motives that were directed toward their own selfish gain and self-interests, rather than good faith motives which were in the best interests of the SAN JAC entities. (vi) The said PETTY, BOYER and COLLINS, undertook another overt act, further demonstrating their improper, ulterior and bad faith motives, by secretly, and without the knowledge and consent of CATES, attempting to, in violation of the UTPA and the relevant Partnership agreements, settle out the lawsuit between the SAN JAC entities and the ITT LIFE and LLOYDS Defendants without any consideration or value going to the SAN JAC entities, but with all the consideration of value going to PETTY, BOYER and COLLINS and, in effect, attempted to sell-out the best

interests of the SAN JAC entities; while Plaintiffs do not have a copy of said settlement agreement, upon information and belief Plaintiffs would show that such sworn statements of said PETTY, BOYER and COLLINS were false and that, indeed, either directly, nominally, indirectly or on a de facto basis, the said PETTY, BOYER and COLLINS agreed to undercut, undermine, forestall, obstruct, impede and do everything they could to destroy the cause of action on behalf of the SAN JAC entities; without any question, such overt actions demonstrated "improper, ulterior and bad faith motives" on the part of the said PETTY, BOYER and COLLINS. (vii) In addition, said PETTY, BOYER and COLLINS have further exemplified their "improper, ulterior and bad faith motives" by their opposition to the winding-up process which was commenced and undertaken by CATES; their total abandonment of the financial affairs of the SAN JAC entities; their total neglect and disregard for what is in

the best interests of the SAN JAC entities; their refusal and failure to properly manage or even undertake to try to manage the said SAN JAC entities; their continued public and private statements that the SAN JAC entities are insolvent, bankrupt and beyond salvation and therefore they wanted nothing further to do with the SAN JAC entities; and their further statements and actions with regard to the SAN JAC entities and their future; indeed, what makes the conduct of PETTY, BOYER and COLLINS particularly pernicious and transparent, is that, until it comes to anything CATES or the Plaintiffs try to do to save or salvage the SAN JAC entities, such entities, as far as they are concerned, are not worth salvaging or making any effort to salvage; it is obvious that PETTY, BOYER and COLLINS take this self-contradictory position solely because they have agreed to do so as a part of the conspiracy with the ITT LIFE and LLOYDS

Defendants. (viii) Though formally requested to do so by CATES and/or Plaintiffs (see e.g. letter attached as Exhibit A), BOYER, PETTY and COLLINS, particularly PETTY, have refused, even though it would be in the best interests of the SAN JAC entities for them to do so, to do any of the following:

(1) Undertake a completion of the winding-up of the affairs of the SAN JAC entities and complete a final partition of the assets of the SAN JAC entities and a final transfer, pursuant to such partition, of the net interests to each of the partners and/or their survivors (such as Ms. Cates) of their share of said assets, including their proportionate share of this lawsuit and the rights of the SAN JAC entities arising out of the causes of actions stated in Counts, One, Two, and Three of this Complaint and any other rights asserted in other proposed complaints (One through Four);

(2) Undertake the aforesaid partition immediately, pending the completion of and/or in lieu of such winding-up.

(3) Agree to the Appointment of a Receiver to conduct such winding-up and partition and/or to intervene in this lawsuit on behalf of the SAN JAC entities;

(4) To agree not to oppose a minority stockholders and partnership derivative suit in this case, so as to protect the interests of CATES and his estate and to preserve their right to seek recovery of their proportionate share of the claims of the SAN JAC entities against the Defendants in this suit.

Not only have PETTY, BOYER and COLLINS properly refused to agree to any of such requests but they have, in wrongful conspiracy and collusion with the Defendants, aggressively opposed the efforts of Plaintiffs in the above respects. (ix) Counsel for the LLOYDS and ITT LIFE Defendants have consulted and

cooperated with the counsel for PETTY, BOYER and COLLINS and they have cooperated together as further overt acts of the conspiracy to undercut, undermine, and destroy the valuable right of action against the ITT LIFE and LLOYDS Defendants which the SAN JAC entities have. (x) The said PETTY, BOYER and COLLINS have further committed overt acts demonstrating such "ulterior, improper and bad faith motives" by, without the knowledge and consent of CATES, removing all the documents pertaining to SAN JAC's dealings with the ITT LIFE and LLOYDS Defendants, beyond the jurisdiction of this Court, to some secret location in Odessa, Texas; said Defendants have refused to cooperate in making such records available to the Plaintiffs and Plaintiffs have reason to believe that said PETTY, BOYER and COLLINS, may have sanitized said documents in an effort to further help and assist the ITT LIFE and LLOYDS Defendants in connection with their defense of Plaintiffs' lawsuit. (xii)

The said PETTY, BOYER and COLLINS were guilty of other overt acts, which consisted of clandestine and secret meetings held with the agents and employees of the ITT LIFE and LLOYDS Defendants and/or by and through their attorneys of record, the purpose of which was to carry forward the conspiracy of the said PETTY, BOYER and COLLINS with the Defendants, to not only bring about the demise of the SAN JAC entities, but to also punish, if you please, the said CATES for having had the courage to sue the ITT LIFE and LLOYDS Defendants.

(e) Your Plaintiffs would also show that said the PETTY, BOYER and COLLINS are insolvent and/or are virtually insolvent and/or, at the least, are unable to pay any kind of judgment that might be rendered against them for their wrongful failure to permit the Plaintiffs to proceed with their cause of action against ITT LIFE and LLOYDS. Indeed, the said PETTY, BOYER and COLLINS have publicly

stated that they cannot pay any such judgment, nor do they have the funds with which to pay any portion thereof. Thus, with respect to any potential judgment against them in the cause of action asserted against them in the State Court (Cause NO. 80-35964, pending the 151st Judicial District Court of Harris County, Texas), PETTY, BOYER and COLLINS are, according to their own statements, and upon information and belief, judgment-proof. Therefore, your Plaintiffs cannot or will not be able to acheive any just satisfaction of their claims by and through PETTY, BOYER and COLLINS and do not have any real or adequate remedy of law against them. Moreover, upon information and belief, one of the bases of the so-called "settlement" between PETTY, BOYER and COLLINS and ITT LIFE is that PETTY, BOYER and COLLINS did not have, and do not have, adequate funds with which to pay any debts of the SAN JAC entities and/or any other debts that might

arise out of the transactions in question.

42. By virtue of all of the conduct of the said PETTY, BOYER and COLLINS and the other facts and circumstances herein, all as stated in par. 41 of this Count, your Plaintiffs request, of this Court, the following relief:

a. The appointment of a Receiver. Pursuant to State Law and/or pursuant to the inherent power of this Court to appoint such a receiver; Plaintiffs request the appointment of a Receiver. The State Law to which we refer is Art. 2263 of the Revised Civil Statutes of the State of Texas, as amended. Pursuant to the power of this Court acting under its diversity of citizenship jurisdiction, this Court has the power to appoint a Receiver pursuant to such State Law and/or pursuant to its own inherent power in equity. Such Receiver should be appointed because: (i) the controling interest in said SAN JAC entities, PETTY and COLLINS, have refused, and continue to refuse; to

intervene said SAN JAC entities in this lawsuit; to authorize CATES and/or the Plaintiffs to carry-on and maintain the lawsuit in this cause; to agree to an appointment of a Receiver in this Court or in State Court; to diligently manage the SAN JAC entities and, in so doing, intervene in this lawsuit; to complete the winding-up of the SAN JAC entities and the dissolutio of SJA, as was started by CATES, which would include a carrying out and maintenance of this lawsuit; to complete such winding-up and partition the interest of the various partners and interest owners in said SAN JAC entities so that each partner and/or shareholder can carry out such rights, such as pursuing the recovery of their proportionate share in this lawsuit; to partition such interests pending completion of the winding-up and/or in lieu of winding-up; and to abstain from their vigorous and aggressive opposition to the efforts of the Plaintiffs to have their

day in Court in this lawsuit. (ii) That, for all the reasons stated in this Count and elsewhere in this complaint, the motivations for the conduct of PETTY, BOYER and COLLINS, are not good faith motivations, but, on the contrary, are bad faith motivations; the said, PETTY, BOYER and COLLINS are seeking to oppose the Plaintiffs' efforts to ursue their rights and the rights of the SAN JAC entities in this lawsuit for selfish and improper motives, rather than for motives which are in the best interests of the SAN JAC entities. (iii) The conduct of PETTY, BOYER and COLLINS does not amount to "sound business practices": insofar as the SAN JAC entities are concerned but, for all the reasons stated above in this Count and elsewhere in this Complaint, they have been, and continue to be, contrary to the best interests of the SAN JAC entities; (iv) In addition, the conduct of PETTY, BOYER and COLINS, in opposing the lawsuit in question and refusing to accede to the

requests of the Plaintiffs, and in the manner in which they have conducted themselves with respect to the SAN JAC entities, have demonstrated a complete and total lack of "diligence", with respect to the rights and best interests of the SAN JAC entities, (v) Also, the said Plaintiffs have no adequate remedy at law and will suffer irreparable harm, absent of the appointment of a Receiver, particularly because the said PETTY, BOYER and COLLINS are insolvent and/or cannot respond in damages for their wrongful conduct in opposing the lawsuit in question and in refusing to grant the Plaintiffs requests so that Plaintiffs can pursue the lawsuit in question. (vi) In addition, the economic well-being of the SAN JAC entities requires active and sound managment; the said PETTY, BOYER and COLLINS have refused to give the said SAN JAC entities any management; they have abandoned said entities; they refuse to carry out any winding-up; they refuse to

take any action with respect to the economic management of said entities; therefore, a Receiver is necessary in order to provide management to said entities, at least until a completion of the winding-up and dissolution can be effectuated, including the maintenance and completion of this lawsuit. (vii) Moreover, a Receiver is needed for all of the reasons set forth in the State Court suit, as above styled and referenced, and said suit is hereby incorporated herein by reference, including all motions requests and orders relative to the appointment of a Receiver. (vii) A Receiver is needed to investigate and determine whether or not such Receiver should intervene in the State Court action against PETTY, BOYER and COLLINS, to recover damages for their mismanagement, neglect, conflict of interest, bad faith, fraud, collusion, conspiracy with those in conflict with said entities, tortious conduct, and the other matters, rights of action and

theories of actions set forth in the State Court action which is incorporated herein by reference. Obviously, PETTY, BOYER and COLLINS, the majority interest of said entities, are not going to sue themselves and they are not going to seek to make recoveries from themselves for their malfeasance and mismalfeasance. (viii) A Receiver is needed for the sole reason that the SAN JAC entities are insolvement and are in need of winding-up and/or dissolution and since the majority (PETTY, BOYER and COLLINS), have failed and refused, and still fail and refuse, to undertake such winding-up and dissolution, it is necessary for the Court to appoint a Receiver to accomplish same. (ix) In addition, a Receiver is needed for all the other reasons stated in Art. 2263, as amended, whether expressly stated herein or not. Therefore, Plaintiffs request this Court to appoint a Receiver pursuant to Art. 2263, as amended, and/or pursuant to its inherent power and equity to do so and

direct such Receiver to take charge of the assets of the SAN JAC entities; to complete the winding-up process and dissolution of said SAN JAC entities as started by JAMES CATES prior to his death; to properly manage said SAN JAC entities, pending such winding-up process and dissolution; upon winding-up and dissolution to partition the net assets of the SAN JAC entities and transfer, with sole rights to exclusive management thereof, including this lawsuit, to each of the partners and stockholders in said SAN JAC entities their proportionate share of said assets; that pending such winding-up and dissolution, to immediately partition such net assets and transfer them to each of the partners and shareholders, including your Plaintiffs with respect to their proportionate share of this lawsuit; to intervene in this lawsuit on behalf of the SAN JAC entities as Plaintiffs, in order to protect and recover all the rights and interests which

are now sought by the Plaintiffs in this cause. The appointment of Receiver is sought pursuant to the guidelines and suggestions of the Court in CATES (Fifth Circuit), 756 F.2d at pp. 1175, 1176.

B. For Order Partitioning Net Assets of the SAN JAC Entities To Each of the Partners and Shareholders, Independent of Winding-Up, Dissolution, Receivership Action or Any Other Action.

Independent of the request for the Appointment of a Receiver, or any of the other actions herein requested or asserted, the Plaintiffs now request the Court to order, pursuant to its power in equity and pursuant to the Declaratory Judgment Act of the State of Texas and pursuant to Federal Procedure providing for Declaratory Judgments, the partition of the net assets of the SAN JAC entities (with or without the cooperation of PETTY, BOYER and COLLINS) and a mandated transfer of the proportionate share of CATES and/or the Plaintiffs as the survivors of CATES,

in all of said assets, including this lawsuit, together with the right on the part of each partitioned partner and shareholder to exclusively control, direct, manage, and maintain their porportionate share of said assets, including the exclusive right to maintain a cause of action for their proportionate share against ITT LIFE and LLOYDS. This request is made in view of this Court's inherent power in equity and on the basis of Federal and State law with respect to declaratory judgments as made pursuant to the implications of the Fifth Circuit in **CATES**, 756 F.2d, at pp. 1170 and 1178-1181.

C. **Delay In Proceedings Pending Appropriate Action By Receiver Or Otherwise.**

Plaintiffs now, as in the past, request the Court to delay these proceeding, as suggested by the Fifth Circuit in CATES, 756 F.2d at pp. 1179, 1180, so that the following actions can be taken and

completed: (i) the appointment of a Receiver either by this Court or by the State Court to take over the affairs and assets of the SAN JAC entities and either intervene in this case on behalf of the SAN JAC entities or complete the winding-up of the affairs of the SAN JAC entities and the partition of the net assets to all shareholders and partners so that they can protect his or her interests in this lawsuit or complete a partition independent of the winding-up and dissolution process so that each partner can protect his or her interests and rights against the ITT LIFE and LLOYDS Defendants; in this connection, your Plaintiff would show that the State District Court has already ordered that a Receiver be appointed. A certified copy of that Order is attached hereto and incorporated herein by reference as Exhibit B. Judge Gupton ordered the appointment of a Receiver on April 4, 1986 and the 151st Judicial District Court is

in the process of actually naming that Receiver; the letter of Plaintiffs to the Court, asking that the Court follow-up with the naming of said Receiver as soon as possible, is attached hereto and incorporated herein by reference as Exhibit C. At the least, if this Court is not going to proceed to appoint a Receiver, this Court, in view of the fact that the State Court has already ordered that a Receiver be appointed, delay these proceedings so that such Receiver can be actually named by the State Court and that Receiver have the opportunity to intervene the SAN JAC entities in this cause of action and/or complete winding-up and a partition of the net assets to each of the individual partners and shareholders so they take such action he or she may deem appropriate with respect to all rights to be asserted against ITT LIFE and LLOYDS and/or partition such net assets independent of the winding-up and dissolution process. (ii) Aside from the

appointement of a Receiver by the State Court, delay these proceedings until a partition of the net assets of the SAN JAC entities can be completed so the Plaintiffs can continue this lawsuit for their proportionate share of the net assets of the SAN JAC entities.

**D. Plaintiffs Seek to Proceed to Collect Their Proportionate Share of the Rights Against ITT LIFE and LLOYDS on the Theory of a Partnership and/or Stockholders Derivitive Suit.**

Pursuant to the mandate of the Fifth Circuit in CATES, 756 F.2d 1176-1181, your Plantiffs now seek recovery against the Defendants, for their proportionate share of all gross damages due the SAN JAC entities, as alleged in Counts One, Two and Three of this Complaint, and for their share of all other possible rights and recoveries against ITT LIFE and LLOYDS on behalf of the SAN JAC entities and in conection with such asserted rights, under the so-called "derivative suit" theory

would show the Court: (i) as asserted above, the said PETTY, BOYER and COLLINS are in control of the SAN JAC entities and refuse to take any action requested by the Plaintiffs, including the bringing of suit against the ITT LIFE and LLOYDS Defendants for the causes of action asserted herein; such refusal includes the requested transfer of the interests in said SAN JAC entities to the Plaintiffs, so that they can pursue the lawsuit, by the said PETTY, BOYER and COLLINS; such refusal include the request to complete the winding-up process; to manage the SAN JAC entities; manage the SAN JAC entities; to undertake any and all action which would be in the best interests of said SAN JAC entities; in addition, these refusals include all other refusals asserted in this Count, as related in detail above; (ii) Your Plaintiffs would show that the refusal of the said PETTY, BOYER and COLLINS to undertake a lawsuit against the ITT LIFE and LLOYDS Defendants, as requested by the

Plaintiffs, and to accede to the other requests of the Plaintiffs outlined above, does not arise out of good or sound business motives or reasons, but arises out of the bad faith, self-serving motives, and fraud of PETTY, BOYER and COLLINS, as well as their illegal, improper and pervading conspiracy with the ITT LIFE and LLOYDS Defendants, all to the disservice of the best interests of the SAN JAC entities; suit; (iii) As a result of the foregoing, the Plaintiffs will have no adequate remedy at law, and will suffer irrerapable harm, unless they are authorized, in equity, and pursuant to the implied terms and provisions of TUPA, and pursuant to the holdings and mandate of the Fifth Circuit in **CATES**, to bring a derivative suit on behalf of the SAN JAC entities against the said ITT LIFE and LLOYDS Defendants, for all the damages due the SAN JAC entities, or, at the least, for proportionate share to which the Plaintiffs are entitled as partners and

shareholders in the SAN JAC entities; (iv) Plaintiffs would show further as to why asserted above, that Plaintiffs have no adequate remedy at law because they cannot recover damages, for such wrongfully refusal, against PETTY, BOYER and COLLINS, because, as aforesaid, they are insolvent, judgment-proof, or, at the least, unable to pay any judgment that might be procured against them as damages which would represent the proportion value of the Plaintiffs in the said lawsuit against the Defendant ITT LIFE and LLOYDS. (v) Plaintiffs would show, and now allege, that the controlling partners and shareholders have been guilty of fraud and misconduct, as alleged above, and that such fraud and misconduct was a motivating force and resulted in their wrongfully refusing to consent to the bringing of this action on behalf of the SAN JAC entities; therefore, this Court is requested to interfere with the management of said entities to the extent that it

authorizes this suit to be maintained by the Plaintiffs as surviviors of one of the partners and shareholders and as successors in interest to such partnership and corporate interest, all as suggested in 756 F.2d at pp. 1177, 1178. (vi) As aforesaid, the peculiar and special circumstances, with respect to permitting such Derivative suit, do exist in this case; are now asserted in full; and, whether specifically stated or not, are now asserted in general and Plaintiffs knew that they are sufficient to justify the Court in allowing the Plaintiffs to proceed on behalf the SAN JAC entities, or, at the least, on behalf of their proportionate interests in said SAN JAC entities, with respect to all claims against the ITT LIFE and LLOYDS Defendants particularly those claims asserted herein. (vii) Your Plaintiffs would show that all prerequisites, preconditions and any other administrative requirements or remedies that might be required by law or by the

partnerships agreements or corporate documents, have been satisfied, complied with and met; in particular, demand was repeatedly made by CATES, and by his successors, upon the controlling partners and shareholders in said entities that they take action against the ITT LIFE and LLOYDS Defendants, and not only have they refused, but they have actively, improperly, and fraudulently opposed the efforts of CATES and his survivors to institute and maintain such lawsuit. (viii) Plaintiffs would show that CATES, and survivor JUDY CATES, were and are, at all times material to this suit, record owners of a one-third general partnership interest in SJI: one-half general partnership interest in SJA: and one-third of the common stock of SJC and that the SAN JAC entities and the majority and controlling shareholders and partners of said entities would be named as parties Defendants were if not for the express mandate of this Court, by order dated

February 7, 1986 prohibiting the Plaintiffs from naming said parties as Defendants. (ix) This derivative suit, as stated, is brought for the benefit of partners and shareholders of the SAN JAC entities, as well for the benefit of the SAN JAC entities themselves, and, therefore, Plaintiffs are entitled to, on behalf of said entities (and the partners and shareholders in derivative fashion), recover all the damages due the SAN JAC entities by the Defendants and to recover reasonable attorneys fees for bringing and prosecuting this derivative suit; at the least, Plaintiffs are entitled to recover their proportionate share of all such damages and attorneys fees.

E. **Right to bring suit on behalf of proportionate share, aside from all the foregoing.** As indicated by the Fifth Circuit, 756 F.2d, 1178-1181, even aside from the appointment of a Receiver, the completon of the winding up and partition, the independent partition, or a suit

brought under the "derivative theory", the Plaintiffs have a right to bring this suit for their proportionate share of the gross damages due the SAN JAC entities by the Defendants herein and your Plaintiffs now seek to enforce such rights, as there stated by the Fifth Circuit. In connection with such assertion, your Plaintiffs adopt all of the other allegations contained in this Count and in the other Counts in this Complaint. The Plaintiffs are particularly entitled to proceed to recover their proportionate share of the damages due the SAN JAC entities by the ITT LIFE AND LLOYDS Defendants in view of this Court's action in refusing to appoint a Receiver; and refusing to delay these proceedings so that a Receiver can be named by the State Court (the State Court having already entered an order stating that a Receiver would be appointed); in refusing to await by a Receiver, the completion of the winding-up process and the partition of the assets of the estate, including the

Plaintiffs' portion of this lawsuit; in refusing to permit or order a partition of the assets of the partnership, including this lawsuit; in refusing to recognize the efforts of the Plaintiffs to bring a stockholders and partnership derivative suit for the recovery of the amounts due the SAN JAC entities by the ITT LIFE and LLOYDS Defendants and/or for, at least, the proportionate share due the minority to recognize or accept any other efforts on the part of these Plaintiffs to preserve and prosecute the lawsuit against ITT LIFE AND LLOYDS on behalf of the SAN JAC entities and/or on behalf of the proportionate interests of the Plaintiffs with respect to said lawsuit. Your Plaintiffs will have no adequate remedy at law and will suffer inreparable harm, unless the Court authorizes Plaintiffs, aside from all other theories such as receivership, partition, derivative suit and other theories to pursue their claim for their proportionate share of the total

damages due the SAN JAC entities by the ITT LIFE AND LLOYDS Defendants with respect to the causes of action asserted herein and all other causes of action. Again, as stated above, with respect to the right of these Plaintiffs to sue for their proportionate share of the damages due the SAN JAC entities, Plaintiffs would name the SAN JAC entities and the other partners and shareholders except that, by order of this Court dated February 7, 1986, the Plaintiffs are prohibited from doing so. Plaintiffs also call to the attention of the Court the allegations above, to the effect that the Plaintiffs have offered to PETTY, BOYER and COLLINS to indemnify them from any costs incident to the bringing of this suit; have offered to pay all costs of this suit and still give the said PETTY, BOYER and COLLINS their proportionate share of the recovery if any; have offered to buy the PETTY, BOYER and COLLINS out of SAN JAC entities so that would not have any exposure with

respect to the bringing of this lawsuit; and have offered to take any and all steps which might protect them from any exposure by the bringing of this lawsuit. In addition, Your Plaintiffs call the attention of the Court to the previous allegations that the Plaintiffs have no adequate remedy of law against the said PETTY, BOYER and COLLINS, because any judgment against them for Plaintiffs; proportionate share of the potential recovery against ITT LIFE AND LLOYDS would be uncollectable. Moreover, all of the allegations with respect to bad faith, fraud, collusion and conspiracy on the part the said PETTY, BOYER and COLLINS, are incorporated in these allegations by reference. In short, aside from all other theories, this Court should, pursuant to the mandate stated by the Fifth Circuit and CATES, at the least, allow these Plaintiffs to proceed to collect their proportionate share of the total damages due the SAN JAC entities by the ITT LIFE AND LLOYDS Defendants.

## COUNT FIVE
## INDIVIDUAL CAUSES OF ACTION ON BEHALF OF CATES AND/OR HIS ESTATE THROUGH THE INDEPENDENT EXECUTRIX, JUDY CATES

43. All of the allegations in paragraphs 1 thru 42 are herein adopted and included herein by reference for the purposes of the allegations of this Count.

44. By reason of the allegations contained in the Factual Background above, and the other allegations contained herein, it is obvious that CATES incurred personal injuries and damages, by reason of wrongs committed against him by the Defendants, which personal injuries and damages were and are separate and apart from any derivative damages he might have arising out of the wrongs committed against the SAN JAC entities by the Defendants herein. As required by this Court, we now set forth separately the wrongs which the Plaintiffs allege that the Defendants committed directly against JAMES CATES (and his estate) individually,

as distinguished from the wrongs committed against the SAN JAC entities, to-wit:

a. The Defendants' anti-trust conduct, though aimed primarily at the SAN JAC entities, and/or the undercutting and compromising of the SAN JAC entities, without also undercutting, compromising, discrediting and/or economically destroying JAMES CATES, would be futile since CATES would then be in a position to reorganize new companies, using the same innovations, formulations, and methodology and to once again compete with the ITT LIFE and LLOYDS Defendants; moreover, unless CATES were also undercut, discredited, and/or economically destroyed as a viable personage in the insurance industry, he would have the financial wherewithal and staying power to see this substantial and complicated lawsuit through to the end. Apparently realizing all of this, and for whatever other reasons that may have motivated said Defendants, after the destruction of the

SAN JAC entities, Defendants separately and independently utilized all of the anti-trust activities alleged in Count One, all of which allegations are specifically incorporated in this paragraph by reference, against CATES personally and such anti-trust activities were a proximate cause of the damages personally sustained by CATES, opportunities of CATES individually, particularly as they related to CATES CONTRACTURAL AND BUSINESS RELATIONSHIPS WITH THE FOLLWOING GROUPS AND ENTITIES: THE SAN JAC entities - CATES had several contracts, including employment contracts and other contracts generating benefits in favor of CATES, with the SAN JAC entities and the Defendants tortiously interferred with those contracts through their anti-trust activities, their breaches of contract with the SAN JAC entities, and through their tortious conduct, all as alleged in Counts One, Two and Three above; the said Defendants tortiously

interferred with CATES' contracts with his agents, consultants, and other persons and entities in the insurance field, with respect to insurance business not involved in AET or the SAN JAC employers multiple trusts - for example, CATES' contract with Texaco, with various Unions, and with other entities; by reason of the conduct of the Defendants, CATES' contract with other persons and entities in the insurance industry, concerning business unrelated to the SAN JAC multiple employers trusts, were tortiously interferred with to the extent that many of them were cancelled and/or modified, and/or made less advantageous to CATES and many prospective advantages and opportunities were completely destroyed or undercut by reason of the tortious conduct of the Defendants; and, lastly, CATES' contract with PETTY, particularly, and with the other partners and board members of the SAN JAC entities, with respect to his authority to wind-up the affairs of

the SAN JAC entities and to file this lawsuit and proceed against LLOYDS and ITT LIFE were tortiously interferred with by Defendants because said Defendants wrongfully induced PETTY, BOYER and COLLINS to not only breach said contracts and agreements and withdraw support of said lawsuit and the winding-up process, but to aggressively and malicously fight CATES' efforts to pursue said lawsuit and to pursue a winding-up of the affairs of the SAN JAC entities.

c. After the destruction of the SAN JAC entities, the Defendants, acting in conspiracy with PETTY, BOYER and COLLINS, boycotted CATES personally and sought to extend said boycott to all phases of the insurance industry; by reason of such boycott, CATES' ability to function in the insurance industry and to work and earn a living was severely and adversely affected, all to his damage as hereinafter alleged.

d. The Defendants, as alleged Count Three above, which allegations are specifically incorporated herein by reference, after the destructon of the SAN JAC entities, tortiously interferred with CATES' personal use and enjoyment of lists of customers that were his own, not SAN JAC's, lists of agents, lists of brokers, lists of marketing sources, marketing plans and techniques, underwriting plans, management plans and techniques, and other information that was peculiar and indispensable to his ability to function as an individual in the insurance industry. By reason of the Defendants' tortious conduct, after the destruction of the SAN JAC entities, Plaintiff's ability to undertake new business endeavors and utilize new business opportunities in the insurance industry were severely impaired if virtually not destroyed.

e. As alleged in Count Three above, the Defendants' tortious interfer-

ence with prospective advantages, applied to and adversely affected, CATES just as much as it did the SAN JAC entities. The allegations in said paragraph are incorporated herein by reference and Plaintiffs would show that the destruction of the SAN JAC entities, caused the Plaintiff CATES individual and personal damage and injuries all as hereinafter alleged.

f. The Defendants' conspiratorial, tortious obstruction of justice and improper efforts, along with PETTY, BOYER and COLLINS to interfere with CATES' right to bring lawsuits against ITT LIFE and LLOYDS, caused CATES personal damage on the various questions of standing to sue in this case, brought about a complete destruction of the value of CATES' interest in the SAN JAC entities and the multiple employers trusts; as alleged, these values were substantial and they were utterly destroyed by the tortious conduct, the anti-trust conduct, the

breaches of contract, and the other conduct of these Defendants herein. Thus, through the Defendants' tortious obstruction of civil justice, the Defendants have taken away, and deprived the Plaintiff of, their proportionate share of the value of the SAN JAC entities and their lawsuit against the Defendants.

g. The Defendants are also guilty of the tort of outrageous conduct toward the Plaintiff, as well as toward the SAN JAC entities. As this Court has already perceived, the primary contractual relationships were between the Defendants and the SAN JAC entities. Even though the primary contractual relationships were not with CATES, the Defendants extended their anti-trust and tortious conduct, and fraudulent conspiracy, to CATES - in other words, in an obvious effort to do same destructive harm to CATES as they sought to do to the SAN JAC entities. Their conduct with respect to CATES was intentional, willful and involved a

fraudulent conspiracy - one based upon subverting CATES' own partners and fellow board members and shareholders in the SAN JAC entities to not only be disloyal to CATES but to take steps, in conspiracy and collusion with the Defendants, to undercut, discredit, and to compromise him personally in the insurance industry. This outrageous conduct of the Defendants was directed personally at CATES, continued **after** the SAN JAC entities had been destroyed, and caused him grave harm, as hereinafter alleged.

h. The Defendants also engaged in slander concerning CATES' personal life; slander of credit toward him; slander with regard to his abilities and experience; and other forms of slander toward him personally, which slanderous activities were directed personally at CATES, as well as toward the SAN JAC entities and occurred ***after*** the obstruction of the SAN JAC entities. This slanderous conduct on the part of the

Defendants caused CATES serious harm, as hereinafter alleged.

i. In addition, the Defendants were guilty of fraudulent activity directed personally toward CATES. This fraudulent activity particularly manifested itself in the fraudulent conspiracy between the Defendants and PETTY, BOYER and COLLINS and was further manifested in their efforts to take, by fraud and stealth, what they could not take directly from CATES; namely his own personal formulations, work product and methodology; and his high reputation and standing in the insurance industry. The specific acts of fraud and conspiracy, of which the Defendants were guilty, have been previously alleged and they apply with equal force to CATES personally. Those allegations are stated in detail in Count One - Four, and are incorporated herein by reference, as if copied verbatim herein. The alleged overt acts of fraud and conspiracy alleged in those paragraphs

are just as much demonstrative of fraud and conspiracy toward CATES personally, as they are toward the SAN JAC entities.

j. The Defendants are also guilty of tortious conversion and misappropriation of the trade secrets of CATES personally. Indeed, it was CATES personally who worked many years to formulate, devise, create and put into successful practice, his methodology, formulations, products, agency lists, and other methods which made the American Employers Insurance Trusts and the SAN JAC entities possible and CATES also had a number of other types of products and insurance concepts, other than the multiple employers trusts, which were obtained and/or compromised by the Defendants' tortious conversions of CATES' trade secrets. Such tortious conduct caused the Plaintiffs the personal damages hereinafter alleged.

k. A particular and specific outcropping of the Defendants' conspiracy

with PETTY, BOYER and COLLINS and other co-conspirators was the continuance of the conspiracy even after the destruction of the SAN JAC entities, to squeeze CATES out of other new starts and efforts to succeed in the insurance industry, all of which were totally unrelated to the SAN JAC entities. The anti-trust conduct of the Defendants and their anti-trust conspiracy, and their fraudulent conspiracy to compromise and discredit CATES, continued, unabated, after the destruction of the SAN JAC entities and caused grave harm to, and severely adversely affected, CATES' ability to survive in the insurance industry following the collapse of the SAN JAC entities.

*l.* In addition, the campaign against CATES, personally - consisting of libel and slander toward him so as to adversely affect his reputation and standing in the insurance industry, the spreading of misinformation and

disinformation and the disparaging of CATES's personal life, his physicial and emotional ability to conduct business in the insurance industry and his general image within the insurance industry - continued unabated by the Defendants, in collusion and conspiracy with PETTY, BOYER and COLLINS, long after the destruction of the SAN JAC entities and was directed at CATES on a personal basis, thus causing the damages hereinafter alleged.

m. All the foregoing acts of misconduct, tortious conduct, anti-trust conduct, fraudulent and conspiratorial conduct and the other conduct hereinabove alleged, was a proximate cause of the personal damages to the Plaintiffs, as hereinafter alleged.

PERSONAL DAMAGES SUSTAINED BY JAMES CATES AND HIS ESTATE

45. All that allegations contained in paragraphs 1 thru 44 are incorporated herein by reference the same as if copied verbatim herein.

46. As a proximate result of the conduct of the Defendants, CATES, his survivors and his estate have sustained the following damages:

a. As reflected by the allegations of the Plaintiffs throughout this Complaint, particularly under Count Four above, which allegations are specificially incorporated herein by reference, and as further reflected by the law of the case, as stated in ***Cates vs. ITT Life***, the Fifth Circuit, supra, Plaintiffs are entitled, at the least, to recover CATES' proportionate share of the damages which are recoverable by the SAN JAC entities of and from the Defendants herein. Those damages are alleged above in gross. CATES' proportionate share will be one-third of the damages due SJI and SJC and one-half of the damages due SJA. In order to eliminate any problems with division or allocation of damages as between the various SAN JAC entities, the

Plaintiffs come now and sue for an across-the-board one-third of all damages due the SAN JAC entities by the Defendants. This includes all of the actual damages, punitive damages, penalty damages (such as under the anti-trust laws), attorneys fees, and any and all other types of damages that may be due the SAN JAC entities by the Defendants.

b. In the alternative, to the foregoing, Plaintiffs come now and sue for the fair market value of the interest the Plaintiffs had in the SAN JAC entities and the American Multiple Employers Trusts, had it not been for the tortious, anti-trust, fraudulent and conspiratorial conduct of the Defendants. CATES' one-third value of such entities, and in the property rights of such entities, including the lawsuit against ITT LIFE and the LLOYDS Defendants, and the loss of profits, and any other damages sustained by the SAN JAC entities, would be one-third of the total gross damages due the SAN JAC entities, all as alleged

above. The allegations above, as to the SAN JAC entities are incorporated herein by reference.

c. In addition to the foregoing damages, CATES personally, and thereby his estate and his survivor, suffered and sustained damages over and above his damages related to the SAN JAC entities, and these damages include the following: (i) the economic loss sustained by CATES indirectly related to the SAN JAC entities, but not directly related to the damages sought by the SAN JAC entities, as alleged above in this complaint. These damages include those sustained by CATES by reason of the Defendants' conduct in destroying his contractual relationships, including employment contractual relationships, with the SAN JAC entities, and the like. At the time the SAN JAC entities began to disintegrate by reason of the conduct of the Defendants, all as herein alleged, CATES was receiving a salary of $60,000.00 per month. After taxes, this amounted to a net salary of

more than $30,000.00 per month. CATES and his estate have been wrongfully economically deprived of this salary for the period of time from 1979 to and through the date of his death in 1984. The sum and amount of the loss to CATES' estate, in that regard, is no less than $1,800,000.00, for which additional amount CATES' estate and the Plaintiffs personally come now and sue. (ii) In addition, CATES and his estate suffered an economic loss, by reason of the conduct of the Defendants, which has taken place since the SAN JAC entities were compromised and/or destroyed and this economic loss is unrelated, even indirectly, to the SAN JAC entities. By reason of the boycott, slander, and other outrageous conduct of the Defendants, acting in collusion and conspiracy with PETTY, BOYER and COLLINS, Plaintiffs' ability to earn money in the insurance industry, following the SAN JAC debacle, has been severely and adversely affected. Plaintiff did earn some money in his

various insurance endeavors, but Plaintiffs would show that the difference between what CATES was able to earn and what he could have earned had it not been for the conduct of the Defendants, was approximately $250,000.00 per year. Plaintiffs come now and sue for such personal economic loss damages, for the approximate five-year period since the destruction of the SAN JAC entities and for a reasonable time into the future, properly discounted, or for a total sum of $12,500,000.00 ($2,500,000.00 for the past five years and $500,000.00 per year for the next ten years), for which amount the Plaintiffs come now and personally sue. (iii) While it is conceded that JAMES CATES was not in the best of health for reasons unrelated to the conduct of the Defendants, the Plaintiffs now allege that the conduct of the Defendants aggravated and exaccerbated his physicial and emotional condition. It is now clear that the unnecessary strain placed upon CATES adversely affected and impaired his

physical and emotional health. Indeed, such egregious conduct on the part of the Defendants, contributed to and hastened the death of JAMES CATES. Plaintiffs come now and sue the Defendants, particularly as a proximate result of their tortious conduct as well as a proximate result of their fraudulent and conspiratorial conduct, for the physical pain and mental anguish suffered by JAMES CATES, but for such conduct of the Defendants he would not have suffered and sustained, from the time such misconduct began in 1977 or 1978 to the date of the death of JAMES CATES in March of 1984. Plaintiffs would show that a reasonable sum for such physicial pain and mental anguish and adverse effects upon CATES' physical and emotional health, as was proximately caused by the conduct of the Defendants, for the period of time from 1977 to and through the date of his death in March of 1984, is and should be no less than the amount and sum of $500,000.00 per year for the years 1977 through 1980 and $1,000,000.00 per year

for the years 1980 through 1984, or a total of $6,000,000.00, for which additional amount the Plaintiffs come now and individually sue. (iv) In addition, the surviving spouse of JAMES CATES comes now and sues, under the common law and the Wrongful Death Statutes of the State of Texas, for the damages sustained by her as a result of the premature death of JAMES CATES, which premature death was caused, at least in part, by the tortious and fraudulent and conspiratorial conduct of the Defendants. In this regard, it is estimated that had the Defendants not engaged in such conduct, JAMES CATES would have lived for at least another ten years. By reason of the conduct of the Defendants, Plaintiffs would show that the Plaintiff's death was hastened by at least ten years. Put another way, the Defendants' conduct was at least one of the proximate causes of the hastening of the death of the Plaintiff by such ten year period. In that ten year period, by reason of the conduct of the Defendants,

the Plaintiff, JUDY CATES, has been and will be deprived of the loss of economic support and benefits which her husband would have provided; his economic benefits to her personally, would have been no less than $200,000.00 per year or $2 million dollars total. (v) In addition, she has been caused thereby to suffer and sustain a loss of society, care, counseling, attention, grief, consortium, physical pain and mental anguish, services, and all those other intangible kinds of damages and losses which only a surviving spouse can sustain by reason of the death of her husband. Those damages, Your Plaintiffs would show, amount to no less than $3,000,000.00, for which additional amount JUDY CATES, as a surviving spouse of JAMES CATES, comes now and directly sues. (vi) In addition to the economic loss sustained by the CATES' estate and JUDY CATES personally, and in addition to the other damages alleged above recoverable on the part of CATES' estate and on the part of

JUDY CATES, the Plaintiffs would show that the estate of CATES is entitled to recover damages for the injuries caused by these Defendants to the Plaintiffs' reputation and standing in the community, and would show that such damages to CATES, and to his survivors, are substantial, particularly in view of the extensiveness and maliciousness of the campaign of villification and slander undertaken by the Defendants, in conspiracy and collusion with PETTY, BOYER and COLLINS. Plaintiffs would show that such damages amount to no less than $5,000,000.00 and are sought by these Plaintiffs, personally, separate and apart from the other damages alleged above. (vii) Also, in addition to the punitive damages sought on behalf of the SAN JAC entities, Plaintiffs come now and seek punitive and exemplary damages on behalf of the Plaintiffs personally. Plaintiffs would show that the maliciousness, willfulness, callousness, and perniciousness of the

Defendants' conduct was particularly devastating insofar as CATES was personally concerned. Not only was his reputation and standing in the insurance industry severely damaged not only was his prize creations, the SAN JAC entities, utterly destroyed; not only was he caused to suffer and sustain severe and continuing economic losses, even after the SAN JAC entities had virtually gone by the board; but the Defendants egregious conduct had a severe and devastating impact upon CATES' health, both physical and emotional and upon his right to life, as well as property. Because of the nature of the conduct of the Defendants, punitive and exemplary damages to the Plaintiffs personally are appropriate. They should be exceptionally substantial in the case of the Plaintiffs personally, because of the severe impact such conduct had upon JAMES CATES, personally, and upon his surviving spouse and upon his estate. Moreover, they should not only be

substantial enough to punish the Defendants for such egregious conduct, but substantial enough to accomplish one of the laudable goals of punitive and exemplary damages, and that is to deter, by example, similar conduct on the part of the these Defendants, and those similarly situated, in the future. In order to accomplish the purposes and goals of punitive and exemplary damages, such damages recoverable by the Plaintiffs personally in this case, should be no less than $20,000,000.00, for which amount the Plaintiffs come now and sue as punitive and exemplary damages. (viii) Plaintiffs also sue for treble damages under the Anti-Trust Laws of the United States as provided for by said laws, insofar as said actual damages relate to those sustained by JAMES CATES and the Plaintiffs personally. (ix) And, Plaintiffs also come now and sue for attorneys fees and pre-judgment interest, as provided for by the laws of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that thee Defendants be cited to appear herein and that upon hearing hereof that Plaintiffs have judgment against Defendants, jointly and severally in the sum and amount of the actual damages sought by the Plaintiffs as their part of the damages due the SAN JAC entities; for the actual damages directly due the Plaintiffs personally; for their penalty damages, such as those provided by the anti-trust laws; for pre-judgment interest; for equitable relief; for costs of court; and for such other and further relief to which the Plaintiffs may show themselves justly entitled to receive.

Respectfully submitted,

/s/ Benton Musslewhite
LAW OFFICES OF BENTON MUSSLEWHITE, INC.
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

DENIS REICH
Attorney at Law

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FIFTH AMENDED ORIGINAL COMPLAINT was mailed to all counsel of record on this the day of May, 1986, by placing same in U.S. Mail, postage pre-paid.

/s/
Benton Musslewhite

APPENDIX H

NO. 80-35964

| | | |
|---|---|---|
| JAMES N. CATES, now JUDY CATES, Individually and as Testatrix of the Estate of JAMES N. CATES, Deceased, | ] | IN THE DISTRICT |
| VS. | ] | COURT OF |
| G. C. PETTEY, III, ROBERT J. BOYER; J. MICHAEL COLLINS; SAN JAC INTERNATIONAL, A Partnership; SAN JACINTO CORPORATION; SAN JACINTO ASSOCIATES, A Partnership | ] | HARRIS COUNTY, TEXAS 151ST JUDICIAL DISTRICT |

FINAL JUDGMENT

The motion of the Plaintiff for the entry of a Final Judgment in this cause, involving the request for a partition of certain interests of two Texas general partnerships, SAN JAC INTERNATIONAL and SAN JACINTO ASSOCIATES, having been presented;

And the parties having announced that they waive any right to a jury trial in this cause;

And it appearing to the Court, based upon the pleadings and evidence presented,

and the Court so finding, that JUDY CATES, INDIVIDUALLY AND AS TESTATRIX OF THE ESTATE OF JAMES N. CATES, DECEASED, is the owner of one-third (1/3) of the following described Federal lawsuit presently owned by SAN JAC INTERNATIONAL and one-half (1/2) of the following described Federal lawsuit presently owned by SAN JACINTO ASSOCIATES, and is entitled to a partition of such fractional interests in those partnerships unto her individually and as Testatrix of the Estate of James N. Cates, Deceased;

And the Court being of the opinion, and so finding, that such request for partition should be in all things granted, therefore, it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff, JUDY CATES, INDIVIDUALLY, AND AS TESTATRIX OF THE ESTATE OF JAMES N. CATES, DECEASED, is hereby partitioned a one-third (1/3) interest (including all lawful incidents appurtenant thereto, including her right, to lawfully maintain,

in her own name and in the capacities stated herein, the Federal lawsuit described herein to the extent of the 1/3 interest hereby partitioned) in and to Cause No. H-79-1998, styled Judge Cates, Individually, and as Independent Executrix of the Estate of James Cates, Deceased vs. ITT life Insurance Company, International Telephone and Telegraph Corporation, ITT Reinsurance Company of London, Hartford Life Insurance Company, Hartford Insurance Group and Albert J. Stratton, in the United States District Court for the Southern District of Texas, Houston Division, the entire interest to such lawsuit presently being in SAN JAC INTERNATION, A PARTNERSHIP; it is ORDERED that the remaining two-thirds (2/3) interest in such lawsuit remain in SAN JAC INTERNATIONAL, A PARTNERSHIP; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff, JUDY CATES, INDIVIDUALLY, AND AS TESTATRIX OF THE ESTATE OF JAMES N.

CATES, DECEASED, is hereby partitioned a one-half (1/2) interest (including all lawful incidents appurtenant thereto, including her right to lawfully maintain, in her own name and in the capacities stated herein, the Federal lawsuit described herein, to the extent of the 1/2 interest jhereby partitioned) in and to Cause No. H-79-1998, styled Judge Cates, Individually, and as Independent Executrix of the Estate of James Cates, Deceased vs. ITT life Insurance Company, International Telephone and Telegraph Corporation, ITT Reinsurance Company of London, Hartford Life Insurance Company, Hartford Insurance Group and Albert J. Stratton,in the United States District Court for the Southern District of Texas, Houston Division, the entire interest to such lawsuit presently being in SAN JACINTO ASSOCIATES, A PARTNERSHIP; it is ORDERED that the remaining one-half (1/2) interest in such lawsuit remain in SAN JACINTO ASSOCIATES, A PARTNERSHIP.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said JUDY CATES, INDIVIDUALLY, AND AS TESTARIX OF THE ESTATE OF JAMES N. CATES, DECEASED, is hereby specifically given the right not only to prosecute the interests above partitioned against the above-named Defendants (and only those named Defendants) in the Federal lawsuit, but she is also given the right to settle and/or compromise her said interests without having to obtain the consent of any of the remaining partners in SAN JAC INTERNATIONAL and/or SAN JACINTO ASSOCIATES, and she, the said JUDY CATES, INDIVIDUALLY AND AS TESTATRIX OF THE ESTATE OF JAMES N. CATES, DECEASED, shall have the sole and exclusive right to compromise and settle said Federal Court lawsuit to the extent of the interests partitioned hereby upon any terms she deems satisfactory to her.

This is a Final Judgment in this severed cause of action, Cause No. 80-35964-A.

SIGNED this 25 day of June, 1986.
10:40 AM

/s/ William R. Powell
JUDGE PRESIDING

APPROVED AS TO FORM:

LAW OFFICES OF BENTON MUSSLEWHITE

/s/
BENTON MUSSLEWHITE
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/s/ Jack Bailey
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*/s/ J. Michael Collins

J. MICHAEL COLLINS, PRO SE, Defendant
* (signed with permission)

APPENDIX I

CAUSE NO. 80-35964

| | |
|---|---|
| JAMES M. CATES | ]IN THE DISTRICT COURT |
| | ] |
| VS. | ]OF HARRIS COUNTY, |
| | ] TEXAS |
| G. C. PETTEY, III | ]151ST JUDICIAL DIST. |

O R D E R

The motion of Plaintiff to retain this case upon the docket and the Court being of the opinion that same should be in all things granted,

IT IS ORDERED that this case be retained upon the docket, a Receiver appointed, a reasonable period of time for discovery and this case certified for trial on this day of April 4, 1986 at 10:30 o'clock a.m./p.m.

/s/ Judge M. Gupton

JUDGE PRESIDING

April 4, 1986.

87 1724

No. 87-1274

(3)

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1987

JUDY CATES, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF JAMES CATES, DECEASED,

*Petitioner,*

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ITT REINSURANCE COMPANY OF LONDON, ITT LIFE INSURANCE COMPANY, HARTFORD LIFE INSURANCE COMPANY, HARTFORD INSURANCE GROUP AND ALBERT J. STRATTON, ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS,

*Respondents.*

## RESPONSE OF RESPONDENT ALBERT J. STRATTON ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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42 pp $ Poldoc

## QUESTION PRESENTED

As discussed herein, because Petitioner has failed to comprehend the issues presented in connection with their Petition for a Writ of Certiorari, Respondent submits that only the following question is presented to this Court, rather than those questions specified by Petitioner:

1. Whether the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") erred in holding that the United States District Court for the Southern District of Texas, Houston Division (the "District Court") acted properly, and without abusing its discretion, in denying Petitioner's motions for leave to file amended complaints, dismissing her action with prejudice, and denying her motion for new trial.

## LIST OF PARTIES

ROBERT J. BOYER

THE ESTATE OF JAMES CATES

JUDY CATES

J. MICHAEL COLLINS

BENTON MUSSLEWHITE

G. C. PETTEY, III

NEWTON B. SCHWARTZ

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

ITT LIFE INSURANCE COMPANY

ITT REINSURANCE COMPANY OF LONDON

HARTFORD LIFE INSURANCE COMPANY

HARTFORD LIFE INSURANCE GROUP

ALBERT J. STRATTON, ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS

SAN JAC CORPORATION

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No. 87-1274

In The

# Supreme Court of the United States

October Term, 1987

JUDY CATES, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF JAMES CATES, DECEASED,

*Petitioner,*

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ITT REINSURANCE COMPANY OF LONDON, ITT LIFE INSURANCE COMPANY, HARTFORD LIFE INSURANCE COMPANY, HARTFORD INSURANCE GROUP AND ALBERT J. STRATTON, ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS,

*Respondents.*

## RESPONSE OF RESPONDENT ALBERT J. STRATTON ON BEHALF OF HIMSELF AND CERTAIN OTHER UNDERWRITERS AT LLOYDS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Albert J. Stratton, on behalf of himself and certain other Underwriters at Lloyds, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this proceeding entered on December 1, 1987 (attached as Appendix D to the Petition).

## STATEMENT OF THE CASE

Respondent respectfully declines to accept Petitioner's Statement of the Case, the presentation of the questions presented and the statement as to which constitutional provisions, statutes and rules are involved in this case as set forth in the Petition for Writ of Certiorari. That presentation of the facts and issues involved in this case includes numerous opinions and inaccuracies which present a uniquely distorted view of this case. Respondent therefore submits the following Statement of the Case.[1]

Despite nearly eight years of pendency, including two appeals to the Fifth Circuit by Petitioner, little significant discovery has been undertaken and this suit has never been tried on the merits. In that time, although five unsuccessful attempts at drafting an understandable complaint have been made, Petitioner has failed to frame an intelligible pleading. Respondent knows little more than that Petitioner's allegations arise out of her deceased husband's involvement with San Jacinto International and San Jacinto Association, two Texas general partnerships (collectively, the "Partnerships") and their contracts with the ITT Defendants and Stratton. Because of Petitioner's

---

1. This suit was originally brought by James Cates. Since his death, prior to the first appeal to the Fifth Circuit, suit has been continued by his widow, Judy Cates. For the purpose of this Response, Judy Cates will be referred to as "Cates" or "Petitioner" unless otherwise indicated. International Telephone and Telegraph Corporation, ITT Reinsurance Company of London, ITT Life Insurance Company, Hartford Life Insurance Company, and Hartford Insurance Group will be collectively referred to as the "ITT Defendants".

own pleading deficiencies, Respondent cannot provide this Court with any meaningful summary of the facts upon which Cates bases her allegations. It is important, however, for this Court to understand the tortured history of this case and the conduct of Petitioner and her counsel in this case to appreciate Petitioner's virtually complete disregard of the orders and rulings of the Fifth Circuit and the District Court.

This case was originally filed in 1979. Over four years ago, the District Court granted Defendants' Motion for Summary Judgment on the ground that Cates had not stated any personal cause of action and was prohibited from asserting claims on behalf of the Partnerships in her individual capacity. Cates appealed that decision to the Fifth Circuit. In a lengthy opinion, the Fifth Circuit remanded Cates' cause of action to determine only one threshold issue:

> whether sufficiently exceptional circumstances exist so that Mrs. Cates should be allowed to prosecute the partnership causes of action, or so that the case should be held in abeyance pending either appointment of a receiver to prosecute those claims or the completion of the partnership dissolution in which Mrs. Cates might receive a fractional interest in the partnership causes of action.

*Cates v. International Telephone and Telegraph Corporation*, 756 F.2d 1161 (5th Cir. 1985). The Fifth Circuit also concluded that Petitioner had no cause of action for (i) breach of the Partnership agreements, (ii) restraint of the Partnership's business, (iii) loss in the value of any Partnership interest, (iv) loss of income therefrom, (v) loss of salary or bonus from any Partnership, (vi) damages to

reputation to any Partnership, or (vii) any prospective advantage arising from the damage to or failure of any Partnership business. *Id.* at 1181-1183.

In reversing the District Court, the Fifth Circuit pointedly noted that Cates'

> pleadings and motions were extremely *conclusory, confused and unclear.* They would appear not to comply either with the requirements that pleadings contain "a short and plain statement of the claim" and "be simple, concise and direct," Fed. R. Civ. P. 8(a) and (e)(1) . . . And our reversal and remand does not imply that the District Court need countenance improper pleading . . .

*Id.* at 1180-1181 (emphasis added). Continuing its extraordinary public critique of the form of Cates' pleadings, the Fifth Circuit emphasized that

> We realize that Cates' second amended complaint is so *general, conclusory and confused,* and that allegations therein which might arguably state individual claims are so intermingled with and undifferentiated from those which are plainly the statement of partnership claims, that it is most difficult, if not impossible, to precisely identify what individual claims are stated or to adequately address their validity on the merits. Clearly the second amended complaint is *defective as a matter of form.*

*Id.* at 1182 (emphasis added). In a final laconic comment on the form of Cates' pleadings, the Fifth Circuit suggested that [f]or future guidance in this and other aspects of the present litigation, we call attention to the provision of Rule 11 . . . *Id.* at 1171, note 16.

Thus, in its perceptive dissection of Cates' defective Second Amended Complaint, the Fifth Circuit recognized

that the form of a pleading may be so "confused" that it is impossible "to adequately address [its] validity on the merits." *Id.* at 1182. Cates' pleadings have yet to achieve a level of intelligibility sufficient for the "merits" to be "adequately addressed." Nevertheless, as "confused," "defective," or "conclusory" as the Second Amended Complaint undoubtedly was, that pleading has proved to be the most intelligible and coherent of all of Cates' pleadings. Subsequent pleadings deteriorated into greater distortion and confusion.

In the interlude between the two appeals of this matter, the only "new" facts of consequence concerned Petitioner's counsel's efforts to delay the District Court by misrepresenting the status of Civil Action No. 80-35964 in the 151st Judicial District Court in Harris County, Texas ("companion state court case"), as discussed below.

On August 19, 1985, after remand from the Fifth Circuit to the District Court, the District Court held a status conference concerning this case and instructed counsel, including Cates' attorney, Benton Musslewhite ("Musslewhite"), to formulate an agenda to set the course of pretrial proceedings. Musslewhite drafted and transmitted to Stratton (but not to the ITT Defendants), a proposed agenda. Although Stratton returned the agenda with suggested revisions, Musslewhite never finalized or filed the agenda with the District Court. Consequently, Stratton and the ITT Defendants submitted their Motion to Set Agenda for Pretrial Matters without the benefit of Cates' participation.

On September 25, 1985, Cates filed her Motion for Leave to File Third Amended Complaint. In its 68 pages,

the proposed complaint failed to address the crucial threshold issue of "exceptional circumstances", which the Fifth Circuit had identified as the only issue to be decided on remand of the case. Instead, Cates added new parties and new causes of action, including alleged violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1984) ("RICO"), the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE § 17.41 *et seq.* (Vernon's 1988), libel, slander, breach of fiduciary duty, misappropriation of trade secrets, and others, and requested an injunction and the appointment of a receiver. Apparently oblivious to the overriding purpose of the remand by the Fifth Circuit, Cates continued to include James Cates as a party to underlying contracts, allege James Cates' purported authority to sue, and assert Partnership claims as personal causes of action. Cates also requested that the District Court restrain further proceedings pending the appointment of a receiver in the companion state court case noted above.

On November 4, 1985, Stratton and the ITT Defendants filed their Joint Opposition to Motion for Leave to File Third Amended Complaint, Motion for Sanctions Under Rule 11, and Motion for a More Definite Statement Under Rule 12. Defendants demonstrated that Cates had: (1) wholly ignored the issue of whether "exceptional circumstances" existed to allow Cates to sue on a Partnership claim; (2) reasserted claims that were moot or affirmed on appeal as properly dismissed; (3) falsely alleged James Cates to be a party to contracts; and (4) asserted new causes of action without alleging factual support, all in violation of Fed. R. Civ. P. 11.

On December 16, 1986, the District Court held a hearing on Cates' Motion for Leave to File Third Amended Complaint. The February 7, 1986 Order issuing from that hearing denied Cates' Motion. A copy of that Order is attached as Appendix E to the Petition. The District Court found that:

(1) the Third Amended Complaint was defective as a matter of form;

(2) the Third Amended Complaint failed to comply with Fed. R. Civ. P. 8(a), 8(e), and 9;

(3) Cates failed to separate personal causes of action from Partnership claims; and

(4) Cates' attempt to add new claims and parties would unduly prejudice Defendants because of Cates' seven-year delay in raising these claims.

The Order prohibited Cates from pleading any claims which the Fifth Circuit had found moot, from adding new claims not specifically included in Cates' Second Amended Complaint, and from adding new parties. Finally, the Order directed Cates to file an amended complaint within twenty days of February 7, 1986.

On the day the Amended Complaint was due, Cates filed her Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint. This Motion was never granted. Four days after the deadline set by the District Court in its Order, Cates filed her Motion for Leave to File Fourth Amended Complaint and proposed Fourth Amended Complaint (together, the "Fourth Complaint Motion").

On March 4, 1986, Stratton and the ITT Defendants filed a Joint Motion to Dismiss Cates' Complaint with prejudice asserting, *inter alia,* that Cates had failed to comply with the orders of either the Fifth Circuit or the District Court and had failed to correct pleading deficiencies.

On March 10, 1986, the District Court held a docket call. Consistent with her conduct throughout seven years of litigation, Cates announced that she was not ready and requested yet another continuance. The District Court denied Cates' request.

On March 12, 1986, the ITT Defendants filed their Opposition to Cates' Motion for Leave to File Fourth Amended Complaint. On March 24, 1986, Stratton filed his Opposition to the same Motion. In those Oppositions, Stratton and the ITT Defendants chronicled Cates' failure to comply with the District Court's Orders. In contravention of the February 7, 1986 Order, Cates had: (1) asserted the mooted claims that James Cates was originally authorized to bring suit and that James Cates had offered to buy out his partners; (2) alleged new (prohibited) causes of action for wrongful death, loss of consortium, and hastened death, conversion, slander and slander of credit; and (3) asserted the mooted claims of diminution of value of his Partnership interest or share of Partnership income, salary or bonus, breach of agreements, tortious interference with business, loss of business reputation or goodwill, loss of opportunity for future advancement and loss of prospective advantages.

On April 11, 1986, the District Court held a hearing on the Fourth Complaint Motion and Defendants' Joint

Motion to Dismiss with prejudice. The court denied the Fourth Complaint Motion and granted Defendants' March 4, 1986 Motion to Dismiss.

On or about April 21, 1986, Cates sought review by the District Court of its rulings by way of Motion for New Trial. In that Motion, Cates represented to the District Court that a receiver had been appointed in the companion state court case and purported to incorporate by reference the state court order appointing a receiver over the Partnership; however, no such state court order was attached. On May 14, 1986, the ITT Defendants filed their Response to Cates' Motion for New Trial. On May 16, 1986, Stratton filed his Opposition to Cates' Motion for New Trial.

After filing her Motion for New Trial, Cates continued to harass Stratton and the ITT Defendants by filing various inappropriate Motions.[2]

On August 19, 1986, the District Court issued its Order denying Cates' Motion for New Trial and denying Defendants' Motion for Sanctions. The District Court found that Cates had failed to cure the fatal flaws of the Third Amended Complaint, which was defective as a matter of form, had failed to comply with the mandate of the Fifth Circuit, and had failed to comply with the District Court's Order of February 7, 1986. The District Court also made

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2. Among the motions filed were a Motion for Extension of Time, Motion for Leave to File Fifth Amended Complaint, Motion for Additional Relief, Motion for New Trial and Reconsideration, and Supplement to Motion for New Trial And/Or Reconsideration. In her Motion for Additional Relief, Cates repeatedly based her arguments on the purported "appointment" of a receiver in the companion state court case.

two significant findings: first, contrary to Cates' representations as certified by her counsel's signature, the facts showed that *no receiver had been appointed* in the companion state court case; and second, that sanctions might be imposed pursuant to Fed. R. Civ. P. 11 because of the continued refusal by Cates' counsel, Musslewhite, to follow the directives of the District Court. Thus, for the second time, Cates received an express warning of impending sanctions. Yet, even though the District Court had seen through Cates' "receiver" charade, it forebore from awarding sanctions for deliberate misrepresentations tantamount to fraud.

Almost six months after the Order of Dismissal, Cates belatedly filed her second notice of appeal with the Fifth Circuit. On December 1, 1987, in a one paragraph opinion, the Fifth Circuit held that the District Court had "ample grounds" to dismiss the Fourth Amended Complaint with prejudice and to deny a new trial, and that the District Court "acted properly" in so doing. This was the only issue considered by the Fifth Circuit; no decision was rendered regarding the compliance or noncompliance by Petitioner with any of the Federal Rules of Civil Procedure regarding any of the Second, Third, Fourth or Fifth Complaints.

Cates then filed a Petition for Writ of Certiorari with this Court. As originally filed, the Petition was not accepted for filing by the Clerk of this Court for failure to comply with the Court's Rules of Practice. This Response is directed to the amended Petition.

———o———

## REASONS FOR DENYING THE WRIT

### I. The Decisions Below Do Not Create Any Conflict Among the Courts of Appeal or Raise Any Questions Under Federal Law.

Cates has continuously failed to appreciate the effect of the rulings of the District Court and the Fifth Circuit noted herein, and the Petition for Writ of Certiorari indicates that this failure to grasp the issues presented persists. The only issue to be considered by this Court in reviewing the Petition for Writ of Certiorari is whether the Fifth Circuit ruled correctly in holding that the District Court did not abuse its discretion in refusing to allow Cates to amend her complaint and in dismissing this case. No questions under federal law or the United States Constitutuion are presented here, and the Fifth Circuit's opinion reached no such questions. Moreover, given the continued abuse of the federal court system by Petitioner and the total disregard by Petitioner and her counsel of orders by the District Court and the Fifth Circuit, Petitioner cannot credibly assert that any Court abused its discretion in giving the Petitioner almost eight years to draft an intelligible complaint.

Not surprisingly, the Petition for Writ of Certiorari totally ignores this issue and deals only with vague and meritless constitutional issues. Petitioner's continued reliance in the Petition on this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1947), ignores, perhaps deliberately, the Fifth Circuit's ruling that occasions this appeal. In *Conley*, the Court decided an issue of jurisdiction under the Railway Labor Act. The Court held that the complaint should not have been dismissed for lack of jurisdiction, and went on, in dictum, to state that the plaintiff's com-

plaint had adequately set forth a claim under the Federal Rules of Civil Procedure in effect at that time. *Id.* at 45-48.

The famous *Conley* language dealing with the general sufficiency of a complaint under the Federal Rules is totally irrelevant to this case. On this appeal, the Fifth Circuit did not decide whether any of Cates' complaints stated a cause of action, and no interpretation of the Fifth Circuit's opinion presents that issue to this Court. This case presents only the abuse of discretion issue, noted above, directed to the District Court's dismissal of the post-remand complaints for failure to comply with its own mandates or those of the Fifth Circuit.

Thus, no conflict exists between the Fifth Circuit's holding and the *Conley* opinion. This Court need not devote attention and time to Petitioner's argument that a denial of the Petition will "deprive" Petitioner of her constitutional rights to a trial by jury. It is much too late to contend that dsimissal of an action as a sanction for improper pleading and refusal to comply with valid district court orders is unconstitutional. *See Societe Internationale Pour Participations Industrielles et Commercialles, S.A. v. Brownell,* 357 U.S. 197 (1958). In this case, both the Fifth Circuit and the District Court have given Petitioner every chance to draft a complaint that could be the basis of a lawsuit, yet after eight years, none has been forthcoming. Clearly, this is not a case where constitutional rights have been violated, or even implicated, and certainly not a case presenting any special circumstances or conflicts among the courts of appeal that would merit granting the Petition.

## II. The District Court Committed No Abuse of Discretion By Terminating This Action.

Although Cates has failed to address the issue, Respondent submits that the District Court did not abuse its discretion in taking any of the post-remand actions described in the Statement of the Case, including dismissing Petitioner's complaints for failure to comply with the orders of the District Court and denying Petitioner leave to file the Second through Fifth Amended Complaints. Further, the District Court and the Fifth Circuit fully considered the issues based on an extensive record and concluded that those Courts decided correctly.

### A. The Dismissal Order Must Stand Unless The District Court Abused Its Discretion

The District Court's April 11, 1986 Order granting Defendants' Joint Motion to Dismiss does not state whether Cates' Complaint was dismissed with or without prejudice. Therefore, the Complaint is deemed to have been dismissed with prejudice. *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985).

Dismissals with prejudice under Fed. R. Civ. P. 8, 16(f), and 41(b) are reviewed on appeal under the standard of abuse of discretion. *Id.; Rodgers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982). Likewise, any error in denying leave to amend is reviewed under the abuse of discretion standard. *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 650 (9th Cir. 1984). Under the standard developed expressly for review of Rule 41(b) dismissals and adopted for Rule 16(f) dismissals, a dismissal will be affirmed where there is a showing of:

(1) delay or contumacious conduct; and

(2) the failure or futility of lesser sanctions; and

(3) the presence of aggravating factors, such as delay caused by Plaintiff, prejudice to Defendants, or delay caused by intentional conduct.

*Callip* at 1519; *Rodgers* at 320.

Characteristically, Cates has ignored this pivotal issue. Nevertheless, case law conclusively demonstrates that the District Court did not abuse its discretion in finally dismissing Cates' Fourth Amended Complaint. As the chronological list of events set forth in Appendix I attached hereto establishes, delay, contumacious conduct, aggravating factors and the futility of lesser sanctions are all abundantly present in this suit.

**B. Cates Repeatedly Filed Defective Complaints in Defiance of Court Orders**

By asserting that the Federal Rules of Civil Procedure only require notice pleadings, and that her allegations of fraud, conspiracy and special damages provide sufficient notice of her claims, Cates misses the point. Cates' Complaints were ultimately dismissed on *two* grounds: not only were these Complaints defective as a matter of form; in addition, Cates repeatedly violated the District Court's orders. Both of these arguments were urged by Defendants in their successful Joint Motion to Dismiss and were found meritorious by the District Court.

In her Petition, Cates conspicuously omits any reference to her well-documented history of disregarding Court Orders. As discussed below, this alone is sufficient basis for affirming the District Court's order of dismissal.

Even so, Cates' assertion that "notice pleading" is sufficient under the Federal Rules is erroneous. As the Fifth Circuit has recently emphasized, even in a suit alleging conspiracy,

> the day is past when our notice pleading practice—circumscribed only by a requirement of subjective good faith on the pleader's part—plus liberal discovery rules invited the federal practitioner to file suit first and find out later whether he had a case or not.

*Hale v. Harney,* 786 F.2d 688, 692 (5th Cir. 1986). Neither appellate nor trial courts "sit to serve as implements of financial torture and delay, to be applied to hapless parties at the pleasure of counsel." *Id.* at 692. Thus, Cates' argument that mere "notice" of claims is sufficient finds no support in recent case law.

Even under the minimal "notice" standard, Cates' Complaints were fatally defective. Cates' Third Amended Complaint failed to address the crucial "special requirements" issue raised by the Fifth Circuit in ordering remand. *See* 756 F.2d at 1178-79, 1180, 1183. Instead, Cates attempted to add new claims and parties *six years* after the inception of this litigation and over *three years* after James Cates, the central witness, had died. Clearly Stratton and the ITT Defendants would have suffered prejudice as a result of Cates' unjustified delay in adding these claims and parties. *Foman v. Davis,* 371 U.S. 178 (1962); *Freeman v. Continental Gin Co.,* 381 F.2d 459, 469 (5th Cir. 1967).

In addition, Federal Rule of Civil Procedure 8 provides that each averment of a pleading shall be simple, concise, and direct. Fed. R. Civ. P. 8(e)(1). Where a

plaintiff fails to comply with Rule 8, the normal course is to dismiss the complaint with leave to amend. However, if after numerous opportunities to amend have been allowed, the plaintiff still cannot comply with Rule 8, the appropriate course of action is to dismiss the complaint. Thus, for example, where plaintiff filed three unsuccessful complaints based on substantially the same facts, the district court did not abuse its discretion in dismissing the third compliant with prejudice since it appeared that no mere amendment could cure the defects. *See, e.g., Feinberg v. Leach,* 243 F.2d 64, 68 (5th Cir. 1957).

In another Rule 8 case, the Eighth Circuit upheld dismissal of the action on facts similar, but less compelling, than the sequence presented herein. *See Michaelis v. Nebraska State Bar Association,* 717 F.2d 437 (8th Cir. 1983). The original complaint was dismissed without prejudice and with leave to amend for failure to comply with Rule 8. Plaintiff then filed an amended complaint substantially similar to the first complaint in form, content, and parties. The District Court dismissed the amended complaint with prejudice. In upholding the District Court's dismissal, the Court of Appeals stated that

> [i]f the plaintiff has persisted in violating Rule 8, the District Court is justified in dismissing the complaint with prejudice.

*Id.* at 439. In *Michaelis,* Plaintiff's complaint was "needlessly long, repetitious, and confused," *id.* and "the style and prolixity of these pleadings would have made on orderly trial impossible." *Id.*

Though describable in similar terms, Cates' pleadings are even more egregious than those cited above. Cates has

filed not two, but five amended complaints. Cates' complaints have repeatedly been branded "defective as a matter of form." After almost eight years of litigation, it is painfully obvious that Cates cannot or will not comply with Fed. R. Civ. P. 8. Therefore, under the authority cited above, the District Court properly dismissed Cates' Complaints with prejudice.

Likewise, the allegations of conspiracy and fraud do not contain the particulars required by Fed. R. Civ. P. 9. For example, Cates alleged that all Defendants were "conspiring," but alleges neither the manner in which Defendants conspired nor any acts to support the conspiracy. In addition, after six years of protracted procedural failures, Cates requested for the first time an injunction and the stay of federal court proceedings pending the appointment of a receiver in the companion state court case. Clearly, at that late date, Cates could not have demonstrated irreparable harm. In view of these and other procedural deficiencies, the District Court demonstrated admirable restraint in decreeing that Cates' pleadings were "defective as a matter of form."

Cates asserted that the District Court erred in denying Cates leave to file the Fourth Amended Complaint. However, that complaint was merely a clone of the rejected Third Amended Complaint. Where new claims are merely repetitions of prior complaints, or are the subject of a separate suit, or have already been determined, a District Court should deny leave to amend. *See Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 548 (5th Cir. 1980); *Buckley Towers Condominium v. Backwald*, 533 F.2d 934, 939 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1976). Similarly, where a plaintiff, like Cates, fails to plead the

essential facts supporting his claim, his claim is subject to dismissal and leave to amend should not be granted. *Jones v. Community Redevelopment Agency,* 733 F.2d 646, 650 (9th Cir. 1984). Likewise, where the proposed amended complaint fails to cure the deficiencies of the original, leave to amend should be denied. *Textor v. Board of Regents of Northern Illinois University,* 711 F.2d 1387, 1391 (7th Cir. 1983) and *Mosler v. M/K Ventures International, Inc.,* 103 F.R.D. 385, 387 (N.D. Ill. E.D. 1984). Thus, the District Court justifiably rejected Cates' equally defective Fourth Amended Complaint.

### C. Sanctions More Lenient Than Dismissal Have Failed

In upholding a dismissal pursuant to Fed. R. Civ. P. 16(f) or 41(b), the record must show that more lenient sanctions have failed or were futile. Case law demonstrates that "lenient" sanctions include warnings or additional opportunities to comply with orders. Both of these more lenient sanctions were utilized by the District Court without success. See App. I.

*Callip v. Harris County Child Welfare Dept.,* 757 F.2d 1513 (5th Cir. 1985) closely resembles the present suit. In *Callip,* plaintiff, like Cates, failed to comply with at least nine deadlines. As in the present case, the District Court provided additional time within which to comply. In affirming the District Court's dismissal, the Fifth Circuit found that providing plaintiff with a "second or third chance following a procedural default" served as "a lenient sanction, which when met with further default" justified the ultimate sanction of dismissal. *Id.* at 1521. Two other Fifth Circuit cases suggest a similar result: *Porter*

*v. Beaumont Enterprise & Journal*, 743 F.2d 269, 272 (5th Cir. 1984), in which the Fifth Circuit found that providing counsel with "another opportunity to correct a procedural default satisfied the 'lesser sanction' requirement," and *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1160 (5th Cir. 1985), where the Fifth Circuit affirmed a dismissal, finding that since

> plaintiff will not be able to pursue his action in the future, dismissal with prejudice was actually the "lesser sanction" because defendants' costs were not adjudged against plaintiff.

*O'Brien v. Sinatra*, 315 F.2d 637 (9th Cir. 1963) is also factually similar to the present suit. In *O'Brien*, plaintiff brought suit for copyright infringement regarding several movies. Some four years after the commencement of the suit, plaintiff still had not filed a claim that "could be understood and tried." *Id.* at 639. Like the District Court in the present suit, the *O'Brien* Court entered an order restricting the number of claims and defendants which plaintiff could include. Nevertheless, plaintiff violated the Court Order and his cause was dismissed. In language pertinent to the present suit, the Ninth Circuit upheld the dismissal, noting that the defendants were

> entitled to have the claim or claims stated in a justifiable manner. Appellant chose not to meet the requirement which was not only reasonable but was absolutely essential to the eventual termination of the litigation.

*Id.* at 642. The Ninth Circuit also insightfully observed that defendants have rights, too. To protect defendants' rights, it was "the obligation of the Court to determine at what point Plaintiff would be foreclosed from further

harassing Defendants with confused and confounding complaints." *Id.* at 642. *See also Fendles v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975) (where district court ordered that the *Third* Amended Complaint be limited to certain expressly stated claims, complaint dismissed with prejudice when it did not meet specification).

In a similar manner, Cates was given far more than a "second or third chance" following procedural defaults. In addition, the orders of the District Court as well as the opinion of the Fifth Circuit are replete with "explicit warnings" of the impending dismissal. *Cates v. International Telephone & Telegraph Corp.*, 756 F.2d 1161, 1181 (5th Cir. 1985) (" . . . the District Court need [not] countenance improper pleading . . . "). Finally, Stratton filed a Motion for Sanctions on two occasions. The District Court considered these "more lenient" sanctions and denied them, obviously finding them futile. Thus, the record clearly demonstrates that more lenient sanctions were considered and atempted on numerous occasions to no avail. After almost eight years of litigation and five amended complaints, Cates has proven herself incapable of drafting anything but a "confused and confounding" complaint. Therefore, Cates has reached the point at which she should be "foreclosed from further harassing" Stratton.

### D. Federal Rules of Civil Procedure Specifically Authorized the District Court To Dismiss Cates' Complaints

Although the District Court in its Order did not expressly cite the procedural basis for its dismissal of Cates' Complaint, both Fed. R. Civ. P. 16(f) and 41(b) support such a dismissal. Rule 16(f) provides that

> [i]f a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference . . . the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2) (B), (C), (D).

Rule 37(b)(2)(C) provides for the dismissal of an action.

*Price v. McGlathery*, 792 F.2d 472 (5th Cir. 1986), a case strikingly similar to the present suit, demonstrates the application of Fed. R. Civ. P. 16(f). There, like Musslewhite, plaintiff's counsel failed to appear at a pre-trial conference, failed to file a pre-trial order and failed to certify his intent to comply with the Court's pre-trial instructions and procedural rules. The District Court found that Price, like Cates, had a "history of disobedience of the Court's orders" and dismissed Plaintiff's complaint.[3] The Fifth Circuit upheld the District Court's dismissal finding that the record disclosed a "clear pattern of delay and contumacious conduct," although, parenthetically, nothing in the record indicated that plaintiff herself was at fault. *Id.* at 474-475. *See also Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (Court of Appeals upheld

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3. Additionally, Musslewhite's vexatious pleading and contumacious conduct in this suit is not an isolated occurrence; it is a deliberate and abusive method of prosecuting lawsuits as detailed in another case pending in the District Court of the Southern District Court of Texas. *Ginther v. Texas Commerce Bank, et al.* Civil Action No. 8-85-6191 (S.D. Tex., May 28, 1986). In *Ginther*, Musslewhite employed the same abusive and prejudicial tactics as in the present suit, and sanctions were awarded in the amount of $167,000 against Musslewhite and his client.

dismissal where plaintiff's counsel engaged in pattern of delay, disobeyed court's instruction to be ready to proceed with trial, and deliberately refused to comply with court's directions).

This case demonstrates the same clear pattern. On April 11, 1986, the District Court entered its Order denying Cates' Fourth Complaint Motion and granting Defendants' Joint Motion to Dismiss with prejudice. In their Joint Motion to Dismiss, Defendants demonstrated that Cates had refused to comply with the District Court's February 7, 1986 Order and failed to correct her pleading deficiencies. The February 7, 1986 Order had commanded Cates to:

(1) allege fraud and conspiracy in compliance with Fed. R. Civ. P. 9;

(2) allege specific acts of Cates' partners' bad faith in refusing him permission to file suit;

(3) state specifically any special damages in compliance with Fed. R. Civ. P. 9;

(4) plead the facts supporting jurisdiction in compliance with Fed. R. Civ. P. 8(a) and 8(e);

(5) omit any mooted claims, including Cates' authority to file suit or maintain the suit on behalf of the Partnerships;

(6) omit any new parties not included in the Second Amended Complaint;

(7) omit any new claims not specifically included in the Second Amended Complaint, including claims

for violations of RICO and the Texas Deceptive Trade Practices Act;

(8) comply with the Fifth Circuit's opinion in the first appeal by separating Cates' personal claims and deleting "Cates" as a contracting party; and, finally,

(9) comply with the District Court's Order within twenty days of February 7, 1986.

In light of the conduct of Cates and her counsel, the February 7, 1986 Order was eminently fair and provided Cates with yet another opportunity to address the sole issue raised by the Fifth Circuit. Instead, Cates defied the District Court's directive in every respect. First, Cates defiantly refused to comply with the District Court's February 7, 1986 Order *within the twenty days* expressly allotted by the District Court. Although Cates filed a last minute Motion for Extension on the day the Amended Complaint was due, that Motion was never granted. In the context of Cates' history of blatant disregard for Court-set deadlines, this failure to meet the deadline set forth in the February 7, 1986 Order in itself warranted dismissal.

Cates also refused to comply with the other dictates of the District Court's Order. Even after the belated Fourth Amended Complaint was finally filed, it was defective. In defiance of the first three directives of the District Court, the particulars of the fraud or conspiracy, the bad faith of Cates' partners, and special damages were still missing or inadequate.

In contravention of the fourth directive, Cates' rambling, disjointed pleading, in which some paragraphs ex-

tended for 5 pages, is anything but simple, concise, or direct. Fed. R. Civ. P. 8. Moreover, the jurisdictional allegations contain a fatal self-contradiction: diversity jurisdiction is alleged even though three of the defendants, like Cates, are clearly Texas residents. Additionally, in violation of the fifth directive, moot or improper claims, such as diminuation of value of Partnership interest or share of Partnership income, breach of agreements, tortious interference with business, anticompetitive conduct interfering with or limiting business, loss of business reputation or goodwill, loss of opportunity for advancement, and loss of prospective advantage, were still included (paragraphs 24, 25, 46-50). In violation of the sixth directive, Cates named new parties, including, as noted, three non-diverse defendants.

In violation of the seventh instruction, Cates once again added new causes of action for slander and slander of credit, conversion, libel, and wrongful death. In violation of the eighth instruction, all of Plaintiff's individual damage claims were identical to the Partnership claims and dependent on injuries to the Partnership. Finally, despite the explicit command of the Fifth Circuit to set forth "exceptional circumstances" justifying the award of relief to a minority partner, no such allegations appear. *Thus, in addition to violating the basic standards of pleading required by the Federal Rules, Cates violated each and every instruction issued to it by the District Court and the Fifth Circuit.*

As for "contumacious conduct", this requirement is supplied by Cates' misrepresentations concerning the purported "appointment" of a receiver in the companion

state court case. On numerous occasions Cates has represented that a reciever was "appointed" in the companion state court case. Cates has urged this "fact" as grounds for delay, for granting a new trial, and for reversing the District Court's dismissal of Cates' causes of action.

An examination of the state court docket sheet, the Order of April 4, 1986, and the Order of July 28, 1986, demonstrates that no court ever intended to appoint a receiver. See App. II, III, and IV, respectively. As the docket sheet attests, on April 4, 1986, the only motion to be considered in the companion state court case was a Motion to Retain. Although Texas Rules of Civil Procedure 695 and 695(a) require notice of an application for receiver and the posting of a bond, no mention is made of an application for receivership. Interestingly, however, the April 4, 1986 Order emanating from that hearing goes beyond the scope of the motion scheduled on the docket sheet. Apparently unwittingly, Judge Gupton, a visiting Judge, signed an Order directing not only that the case be retained upon the docket, but also that "a receiver [be] appointed." Months later, but long before Cates filed her Brief to the Fifth Circuit, counsel for Defendants in the companion state court case became aware that the Order granting the Motion to Retain also surreptitiously included language "appointing" a receiver. Therefore, on July 28, 1986, Visiting Judge Gupton signed an Order correcting and rescinding the language of the April 4, 1986 Order. Cates has repeatedly trumpeted the now defunct April 4, 1986 Order as authority for the "appointment" of a receiver, but has conspicuously omitted any mention of the subsequent July 28, 1986 correction.

Thus, the "appointment" of a receiver in the companion state court action was nothing more than a charade. Cates and Musslewhite apparently perpetrated a fraud on the unwitting state court by submitting an Order containing language superfluous to the docketed Motion to Retain. Cates and Musslewhite have repeatedly used the fruits of that fraud to support their arguments against dismissal before the District Court and the Fifth Circuit. Months before Cates filed her brief in the Fifth Circuit, the fraudulent Order "appointing" a receiver had been corrected and the erroneous language rescinded. Nevertheless, Cates, over Musslewhite's signature, has continued to allege that a receiver has been "appointed."

Thus, in the present case, Cates has exhibited a pattern of delay and deliberate refusal to comply with the directives of the District Court and the Fifth Circuit. Furthermore, on at least one occasion, Musslewhite failed to appear at a pre-trial conference without prior notification to the Defendants' counsel, resulting in needless delay and expenses. Finally, after almost a decade of litigation, at the docket call Cates announced that she was not ready for trial. Therefore, because the record reveals Cates' contumacious conduct *and* delay, the failure of lesser sanctions and a panoply of "aggravating factors", including misrepresentation in three different courts, the District Court properly dismissed Cates' Fourth Amended Complaint.

### III. The Grant to Cates by a State Court of an Interest in this Action After its Dismissal by the District Court Does Not Renew the Action.

Cates asserts that the District Court erred in dismissing her claims because the 151st Judicial District Court of

Harris County, Texas approved an agreed Final Judgment partitioning to Cates a fractional interest in the assets of the Partnership. First, as that Final Judgment expressly states, Cates did not receive a fractional interest in "all assets" of the Partnership. She received an interest in this lawsuit. Second, the Final Judgment was approved on June 25, 1986—over two months after Cates' claims were dismissed. Therefore, the partition was too late to affect the present suit. Finally, as discussed above, Cates ignores the fact that her claims were dismissed because of her failure to comply with court orders. Any partitioning of an interest in this lawsuit has no bearing on the District Court's dismissal.

———o———

## CONCLUSION

For the reasons noted above, Respondent respectfully requests that this Court deny Petitioner's Request for a Writ of Certiorari.

Respectfully submitted,

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*Attorney for Respondent*
*Albert J. Stratton, On Behalf Of*
*Himself and Certain Other*
*Underwriters at Lloyds*

## APPENDIX I

### List of Conduct of Petitioner

1. *June 26, 1980*—The District Court ordered that responses to the then extent Motion to Intervene be filed no later than August 4, 1980. Cates filed her response on August 7, 1980, *three days late.*

2. *August 6, 1980*—Cates filed her Motion to Defer Adjudication of Motion to Drop Parties claiming, over Musslewhite's signature, that "Plaintiff simultaneously received an extensive reply of Intervenors to Plaintiff's response and . . . Plaintiff has not had sufficient time to consider, brief, and prepare for [such reply]." Contrary to Cates' representation to the District Court, the Intervenors' reply was actually *filed June 20, 1980,* weeks before.

3. *October 20, 1980*—The District Court entered an Order granting one of Cates' many requests for an extension of time.

4. *January 16, 1981*—Cates filed yet another Motion for Extension of Time.

5. *August 28, 1981*—Cates again filed a Motion for Extension of Time, this time to answer requests for admissions. In that Motion, Cates represented, over Musselewhite's signature, that Cates did not receive the requests for admission. In actuality, as was established by Defendants' Opposition to Plaintiff's Motion, Cates had in fact received the requests for admissions as attested by the green domestic return receipt card and the affidavit of William Key Wilde

recounting the statement by Ken Craig, of Musselwhite's office, wherein he admitted receiving the requests.

6. *April 14, 1982*—The District Court in its Order conclusively found that, *contrary to Musslewhite's representations* to the Court, Musslewhite had "received the requests for admissions on June 21, 1981 and failed to answer within the time provided by Rule 36."

7. *June 25, 1982*—The District Court entered an Order commanding Cates to file his Response to Stratton's Motion for Summary Judgment *no later than August 2, 1982.*

8. *June 28, 1982*—Cates nevertheless filed yet another Motion for Extension of Time to Respond to Stratton's Motion for Summary Judgment.

9. *August 8, 1982*—Cates finally filed his Response to Stratton's Motion for Summary Judgment—*three days late.*

10. *August 17, 1982*—Cates filed yet another Motion to Extend Time for Filing Response to Motion for Summary Judgment.

11. *October 26, 1982*—In its Order, the District Court first voiced a warning that echoed throughout the coming years: ". . . this case has been a procedural thorn in the side of this Court."

12. *December 21, 1982*—Once again the District Court in its Order blasted Musslewhite's conduct stating . . . This protective order is necessitated by Plaintiff's counsel's [Musslewhite's] *failure to comply with the*

*filing and discovery deadlines* imposed by Order of this Court dated October 26, 1982, and this Order is necessary to protect Defendants from unnecessary expense and prejudice as a result of Plaintiff's failure to comply with this Court's October 26, 1982 Order. (emphasis added).

13. *February 16, 1983*—Once again, the District Court pointedly warns that Cates "has attempted to state and sue on causes of action . . . which had previously been dismissed by this Court's Order of April 14, 1982."

14. On the first appeal to the Fifth Circuit, Cates continued her contumacious conduct and delay. On *September 16, 1983,* Cates filed her Motion for Leave to File Brief Out of Time. This Motion was later followed by Cates' Motion to File Rough Draft Form of Brief.

15. *November 4, 1985*—After remand by the Fifth Circuit to the District Court, Defendants filed their Motion to Set Agenda for Pretrial Matters as requested by the District Court. This Motion was filed unilaterally by Defendants because of Cates' refusal to cooperate in finalizing an Agreed Agenda as instructed by the District Court.

16. *December 6, 1985*—A pretrial conference was cancelled. Counsel for all of the Defendants attended the conference. However, Musslewhite, without prior notification, unilaterally "passed" the hearing, alleging that he was in trial.

17. *February 26, 1986*—Cates filed yet another Motion for Continuance.

18. *February 27, 1986*—Cates filed yet another Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint.

19. *March 5, 1986*—Cates filed yet another Motion for Extension of Time Within Which to File Motion for Leave to File Fourth Amended Complaint.

20. *March 7, 1986*—Cates' Motion for Continuance was denied.

21. *March 10, 1986*—The District Court held docket call. Cates announced that she was not ready.. Cates' Motion for Continuance was denied.

22. *March 27, 1986*—After Cates' causes of action had been dismissed, Cates filed yet another Motion for Extension of Time.

23. *September 12, 1986*—Cates filed her Notice of Appeal to the Fifth Circuit, over six months after the Order dismissing her Complaint was entered.

24. *December 29, 1986*—Defendants filed their Motion to Dismiss Appeal for Appellant's Failure to Prosecute. Cates had requested and was granted *two extensions* within which to file her brief, but, nevertheless, the extensions expired on December 22, 1986, without any brief being filed.

RGR06/01

App. 5

APPENDIX II

80- 35964 Filed 11 19 85

James N. Cates

PLAINTIFFS

Benton Musselwhite

Attorneys

NATURE OF ACTION

Injunction

VS.

H C Petty, III, et al

DEFENDANTS

Attorneys

SURETIES ON COST BOND

19

Jury Fee Paid By

SETTINGS

General Order of Court 4-1515

10-20-86 Canal for Pltff at Deft's failed & Pltff for hearing on application for T/I

FEB 18, 1985 MOTION FOR S/J, PLEA IN ABATEMENT, MTN TO DISMISS, MTN TO DISQUALIFY PLTF'S ATTY AND MTN FOR SECURITY Agreed Order signed ADPT

APR 2 1985 MTN TO RETAIN Granted. Case is RETAINED ONLY through OCT 2, 1985 ADPT

April 4 1986 Motion to Retain Granted. Set for Trial at 11:30 AM etc Oct 6, 1986 — DM Sugarman D.J.

~~APR 1986~~

~~APR 1986~~

JUN 25, 1986 Final judgment signed and proper order to be presented. W.R.P. JB, GC

## APPENDIX III

CAUSE NO. 80-35964

| | | |
|---|---|---|
| JAMES M. CATES | ) | IN THE DISTRICT COURT OF |
| | ) | |
| VS. | ) | HARRIS COUNTY, TEXAS |
| | ) | |
| G.C. PETTEY, III | ) | 151st JUDICIAL DISTRICT |

ORDER

The motion of Plaintiff to retain this case upon the docket and the Court being of the opinion that same should be in all things granted;

IT IS ORDERED that this case be retained upon the docket, a Receiver appointed, a reasonable period of time for discovery and this case certified for trial on this day of April 4, 1986 at 10:30 o'clock at a.m.

/s/ M. Gupton
Judge Presiding

April 4, 1986

## APPENDIX IV

NO. 80-35964-A

| | | |
|---|---|---|
| JAMES N. CATES, Now Judy CATES, Individually and as Testatrix of the Estate of JAMES N. CATES, Deceased | ) | IN THE DISTRICT COURT OF |
| VS. | ) | HARRIS COUNTY, |
| G. C. PETTEY, III; ROBERT J. BOYER; J. MICHAEL COLLINS; SANJAC INTERNATIONAL, A Partnership; SAN JACINTO CORPORATION; SAN JACINTO ASSOCIATES, A Partnership | ) | TEXAS<br>151st JUDICIAL DISTRICT |

O R D E R

BE IT REMEMBERED that on the 28 day of July, 1986, came on to be heard the Motion to Correct Order of the parties and the counsel to correct a preceding Order in this case having been presented to the Court, and the Court having considered same, the Court is of the opinion that same should be in all things granted. It is, therefore,

ORDERED that the Court's Order of April 4, 1986 referred to and incorporated in "Motion to Correct Order" be in all things withdrawn and corrected to read as follows:

"O R D E R

BE IT REMEMBERED that on the 4 day of April, 1986, came on to be heard the Motion of Plaintiffs to retain this case upon the docket and the Court

being of the opinion that same should be in all things granted;

IT IS ORDERED that this case be retained upon the docket.

SIGNED AND ENTERED this 28 day of July, 1986.

/s/ M. Gupton
Judge Presiding

APPROVED AS TO FORM
AND SUBSTANCE:

LAW OFFICES OF JACK R. BAILEY
/s/ Jack R. Bailey
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ATTORNEY FOR DEFENDANTS

.....

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NO. 87-1724

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, Deceased,

Petitioner,

V.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. WHETHER THE PETITIONER'S DISMISSAL FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER IS AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT WHEN THERE ARE NO UNIQUE ISSUES OF LAW OR PROCEDURE INVOLVED?

2. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER?

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# RESPONDENTS' BRIEF IN OPPOSITION

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The Respondents, International Telephone and Telegraph Corporation, ITT Life Insurance Company, and Hartford Life Insurance Company, respectfully request that this Court deny the petition for writ of certiorari, seeking to review the judgment of the United States Court of

Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 20, 1987.

## STATEMENT OF THE CASE

This case has had a protracted history of delay due to Petitioner's failure to properly plead her claims or to comply with numerous trial court orders. This suit was filed in September 1979 and has been on appeal twice. The first appeal was from a dismissal for failure to state a personal cause of action. The first dismissal was preceded by four hearings, several orders, and two amended complaints. The second appeal, which gives rise to this petition, arises from a dismissal under Fed. R. Civ. P. 41(a) for failure to comply with the trial court's orders.

A. First Appeal

In the first appeal, the Court of Appeals described Petitioner's pleadings as extremely confused and unclear and stated that "[t]hey were doubtless subject to motions for more definite statements under Fed. R. Civ. P. 12(e) and perhaps to

motions to strike under Fed. R. Civ. P. 12(f). **Cates v. Intl. Tel. and Tel. Corp.**, 756 F.2d 1161, 1180 (5th Cir. 1985). The Court of Appeals remanded the case to the trial court to allow these and other pleading defects to be corrected.

B. Actions After Remand

Following the remand, the trial court conducted at least four hearings and issued four orders concerning the defects in Petitioner's complaint. Over a six month period, Petitioner was given two opportunities to amend. Despite these exhaustive efforts by the trial court, Petitioner ignored the trial court's orders. Additionally, in an attempt to get the trial court to reverse its dismissal, Petitioner willfully misrepresented the status of a state court case.

After remand, Petitioner agreed to replead in compliance with the Court of Appeals' opinion. However, the Third

Amended Complaint was a mere regurgitation of the defective Second Amended Complaint. The Third Amended Complaint also included new claims not allowed by the trial court and claims which the Court of Appeals had concluded could not be asserted by Petitioner.

On December 16, 1985, the trial court held a hearing on Petitioner's Third Amended Complaint. The court ruled on all pleading defects and denied leave to file the Third Amended Complaint. The court directed Petitioner to comply with Fed. R. Civ. P. 9 and 8, denied Petitioner's leave to add new claims or to add new parties, and directed the Petitioner to remove claims which were duplicative or mooted by the Court of Appeals' original opinion.

On February 7, 1986, in a six page Order, the trial court denied Petitioner's Motion to Reconsider its December 16, 1985 ruling and granted Respondents' Motion for

a More Definite Statement. (Petitioner's Appendix E, at pp. 1-9). Among the trial court's findings, it held that the Third Amended Complaint was defective because it failed to comply with Fed. R. Civ. P. 9, 8(a) and 8(e), and because it did not correct the defects of the Second Amended Complaint. Finally, the trial court found that the addition of new parties and new claims were not required by the Court of Appeals' opinion and that their addition would unduly prejudice the Respondents.

The trial court then gave Petitioner nine specific directives in order to replead in compliance with the Federal rules. (Petitioner's Appendix E, at pp. 3-9). The court gave Petitioner twenty days in which to amend in compliance with its Order. As was true throughout this case, Petitioner did not meet the deadline and made no effort to comply with the trial court's February Order.

On March 3, 1986, Petitioner filed a Motion for Leave to File a Fourth Amended Complaint which had the same defects as the prior complaints.

After a total of seven orders and eight hearings on the deficiencies of the complaints -- not counting the First Court of Appeals' opinion -- the trial court had finally had enough. At the hearing of April 11, 1986, the trial court issued its Order dismissing Petitioner's Complaint. (Petitioner's Appendix A, at p. 1).

C. Motions for New Trial

On April 21, 1986, Petitioner filed the first of five Motions entitled "Motions for New Trial." The first Motion asked the court to reconsider its dismissal because the Third and Fourth Amended Complaints were proper and because of proceedings in a state court action. Petitioner had taken no action in this state court case in six years. On two occasions, the Petitioner

expressly represented to the trial court that a Receiver had been appointed in state court. This was false.

D. Final Trial Court Order

On August 19 1986, the trial court issued its eighth and final order in this case. (Petitioner's Appendix B, at pp. 1-7). The trial court denied Petitioner's Motions to Reconsider. The trial Court concluded that: 1) the amended complaints were mere regurgitations of the Second Amended Complaint; 2) the specific requirements for repleading had not been adhered to; and 3) Petitioner had failed to amend her pleadings in compliance with the Court of Appeals' mandate. (Petitioner's Appendix B, at pp. 1-7). The trial court found that, contrary to Petitioner's express representations, no state court Receiver had been appointed.

E. Second Appeal

The Fifth Circuit affirmed the District Court's dismissal and denied Petitioner's petition for rehearing and rehearing en banc. (Petitioner's Appendix C, at pp. 1-2; Petitioner's Appendix D, at pp. 1-2). Petitioner now seeks writ of certiorari before this court.

## ARGUMENT

**REASONS WHY THE PETITION SHOULD BE DENIED**

**I. PETITIONER'S FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDERS IS NOT AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT.**

A. Issue Raised by Petition

The only question properly presented by the Petition is whether the trial court abused its discretion when it dismissed Petitioner's Complaint for failure to comply with its February 7, 1986 Order. As found by the trial court and affirmed by the Court of Appeals, Petitioner failed to

file an amended complaint in compliance with this Order. As a result the trial court dismissed the suit with prejudice. (Petitioner's Appendix A, at p. 1).

B. Not Appropriate for Review

Rule 17 of the Sup. Ct. R. states that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Sup. Ct. R. 17.1. Although the list of considerations in Sup. Ct. R. 17 is not exhaustive, Petitioner has failed to present any issues which come within the scope of this Rule.

Petitioner has not alleged that the second holding of the Fifth Circuit conflicts with a decision of another Court of Appeals on any matter. However, Petitioner has tried to convince this Court that there is conflict between the first

and second opinions of the Court of Appeals in this case. This is a "phantom issue."

After the first appeal by Petitioner, the Court of Appeals remanded the case to the trial court to correct pleading deficiencies. On the second appeal, the Court of Appeals' affirmed the trial court's dismissal for failure to comply with the trial court's subsequent orders.

In addition, there is no conflict with the opinion in **Conley v. Gibson**, 355 U.S. 41 (1957). (Petitioner's writ at pp. 28-29). Petitioner simply ignored proper orders of the trial court, and her complaint was dismissed.

Finally, this Court has held that it will not reverse a Court of Appeals if fair-minded judges could differ in opinion. **Nat'l. Labor Relations Bd. v. Pittsburg S.S. Co.**, 340 U.S. 498, 503 (1951). Review of this Complaint is not appropriate by this Court because it would be substituting

this Court's judgments in place of the Court of Appeals and the trial court on a matter of discretion.

## II. IT WAS NOT AN ABUSE OF DISCRETION TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER.

### A. Legal Standard

Rule 41(b) to the Fed. R. Civ. P. authorizes the trial court to dismiss a complaint for failure to "comply with these rules or any order of the court . . . ." The Fifth Circuit has held that a dismissal pursuant to Rule 41(b) will be reviewed to determine if there was an abuse of discretion. It is not an abuse of discretion to dismiss a complaint where there has been a record of delay and contumacious conduct. **Connolly v. Papachristid Shipping Ltd.**, 504 F.2d 917, 920 (5th Cir. 1974).

There is ample authority to sustain a dismissal for failure to replead. In **Nevijel v. North Coast Life Ins. Co.**, 651

F.2d 671 (9th Cir. 1981), the court sustained a dismissal under Rule 41(b) on the grounds that the plaintiff failed to plead in compliance with Rule 8(a). Likewise, in **Henderson v. Duncan**, 779 F.2d 1421 (9th Cir. 1986), the court sustained a dismissal of a complaint on the grounds of inordinate delay, the existence of numerous warnings, and the prejudice to the trial court's management of its own docket. Finally, in **Agnew v. Moody**, 330 F.2d 868 (9th Cir. 1964) and **Findley v. Rittenhouse**, 416 F.2d 1186 (9th Cir. 1969), the court dismissed complaints where the plaintiff had been given opportunities to amend and failed to comply with those orders.

In this case there is a clear history of delay and willful disobedience of the trial court's orders by Petitioner. The trial court ordered Petitioner to correct deficiencies in Petitioner's Complaint which were pointed out by the Court of

Appeals. In addition to holding four different conferences with Petitioner and issuing four orders, the trial court listed nine specific defects that it found in the complaints. Petitioner's Fourth Amended Complaint failed to correct any of the deficiencies.

B. Facts Supporting Dismissal

In the first appeal, the Fifth Circuit variously described Petitioner's pleadings as ". . . extremely conclusory, confused, and unclear." **Cates v. Int'l. Tel. & Tel. Corp.**, 756 F.2d 1161, 1180 (5th Cir. 1985). The court went on to hold, that Petitioner's pleadings ". . . were doubtless subject to Motions for More Definite Statements under Fed. R. Civ. P. 12(e) and perhaps to Motions to Strike under Fed. R. Civ. P. 12(f). Id.

Following remand, the trial court conducted at least four hearings and issued at least four orders concerning the defects

in Petitioner's Complaint. Over the six month period, Petitioner was given two opportunities to amend.

Despite these exhaustive efforts by the trial court, Petitioner chose to ignore the trial court's orders. As a result of Petitioner's failure to comply with the trial court's orders, the trial court issued its Order dismissing Petitioner's Complaint. (Petitioner's Appendix A, at p. 1).

C. Defective Motions

On April 21, 1986 Petitioner filed the first of five alternate motions under Fed. R. Civ. P. 59(e) and 60(b). All of these motions were overruled on August 19, 1986. (Petitioner's Appendix B, at pp. 1-7).

A trial court's ruling on a Rule 59 or 60 Motion will not be disturbed absent an abuse of discretion. See, **Westbrook v. General Tire & Rubber Co.**, 754 F.2d 1233, 1241 (5th Cir. 1985). In addition, the

denial of a Rule 60(b) Motion does not allow the appellate court to consider the underlying order of dismissal. **Browder v. Director, Dept. of Corrections, Ill.**, 434 U.S. 257, 262, 263 (1978).

All of Petitioner's Motions filed after April 21st cannot be considered under Rule 59(e) as Motions for new trial. They were not timely filed, and if they raised any issues, those issues would have to be treated as motions pursuant to Fed. R. Civ. P. 60(b) for relief from judgment.

Only subpart 60(b)(2) of Fed. R. Civ. P. 60 applied to this case. It allows the trial court to set aside a judgment based on newly discovered evidence. In this case, Petitioner did not present any newly discovered evidence to the trial court. All Petitioner's activities after April 11, 1986 related to new actions that were taken in a pending state court action the state court did not render a final decision until

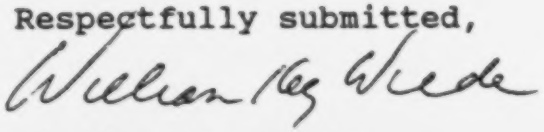
after this case was dismissed. Thus, there was no basis for the trial court to consider any of Petitioner's belated machinations in state court.

Petitioner's April 21, 1986 Motion, the second appeal to the Fifth Circuit, and this petition for writ of certiorari raise false issues. Petitioner claims that the April 11, 1986 Order was an improper ruling on Petitioner's standing to sue, and determination of whether Petitioner had failed to state a claim. In reality, the trial court dismissed because of Petitioner's failure to comply with the trial court's previous orders and the mandate of the Court of Appeals for the Fifth Circuit. (Petitioner's Appendix A, at p. 1).

## CONCLUSION

For reasons stated, this petition for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, William Key Wilde, a member of the Bar of this Court, hereby certify that on this 16th day of May, 1988, three copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

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